

# Congressional Perquisites and Fair Elections: The Case of the Franking Privilege

On July 21, 1971, the United States House of Representatives voted<sup>1</sup> to delegate to its Committee on House Administration the power to

fix and adjust from time to time, by order of the committee, the amounts of allowances . . . [for representatives] for clerk hire, postage stamps, stationery, telephone and telegraph and other communications, official office space and official office expenses in the congressional district represented . . . , official telephone services in the congressional district represented, and travel and mileage to and from the congressional district represented.<sup>2</sup>

The stated purpose of this new procedure was to eliminate the need for the House to debate and vote a bill<sup>3</sup> or resolution<sup>4</sup> in order to authorize<sup>5</sup> a change in allowances.<sup>6</sup> However, some congressmen stated during debate on the measure that the new procedure would permit increases in congressional perquisites because it would reduce public

1. H.R. Res. 457, 92d Cong., 1st Sess., 117 CONG. REC. 26450 (1971).

2. 2 U.S.C.A. § 57(a)(1) (Supp. 1973). This delegation was foreshadowed by a 1969 Act which gave the Committee power to allocate office equipment among members. Act of Dec. 5, 1969, Pub. L. No. 91-139, 83 Stat. 291. For the perquisites of committees of the House, see 2 U.S.C.A. § 57(a)(2) (Supp. 1973).

The Senate counterpart of the House Administration Committee, the Committee on Rules and Administration, has discretion to fix and adjust only one allowance, the authorization for telegrams and long distance telephone calls. 2 U.S.C.A. §§ 58(a)(1), (b)(1)(A) (Supp. 1973). The Rules and Administration Committee has had this power since January 1, 1968. Act of July 28, 1967, Pub. L. No. 90-57, 81 Stat. 130. The Committee allows each senator a particular dollar amount. *Hearings on Legislative Branch Appropriations for FY 1973 Before a Subcomm. of the Sen. Appropriations Comm.*, 92d Cong., 2d Sess. 465 (1972). The total expended for all senators in calendar year 1973 was \$750,000. *Hearings on Legislative Branch Appropriations for FY 1974 Before a Subcomm. of the Sen. Appropriations Comm.*, 93d Cong., 1st Sess. 567 (1973) [hereinafter cited as *Senate Hearings*].

3. See, e.g., Act of June 23, 1949, ch. 238, 63 Stat. 264 (increasing the telephone and clerk hire allowances).

4. See, e.g., H.R. Res. 1276, 91st Cong., 2d Sess., 116 CONG. REC. 39449 (1970) (increasing the stationery allowance); H.R. Res. 1270, 91st Cong., 2d Sess., 116 CONG. REC. 39448 (1970) (increasing the telephone allowance); H.R. Res. 1264, 91st Cong., 2d Sess., 116 CONG. REC. 40186-87 (1970) (permitting each representative three more clerks).

In order to have effect beyond one Congress, such House resolutions would often be added to an appropriations bill and enacted into law. See Act of Jan. 8, 1971, Pub. L. No. 91-665, 84 Stat. 1990 (enacting H.R. Res. 1276, H.R. Res. 1270, and H.R. Res. 1264).

5. The order of the House Administration Committee serves as authorization for an appropriation, just as a bill, *supra* note 3, or resolution, *supra* note 4. A separate appropriation must be voted before any money is released for an authorization. 117 CONG. REC. 26446 (1971) (remarks of Rep. Thompson).

6. 117 CONG. REC. 26446 (1971) (remarks of Rep. Thompson). Some representatives "privately" called the change a "blatant power grab" by Chairman Wayne Hays of the House Administration Committee. 30 CONG. Q.W. REP. 2065 (1972).

and congressional scrutiny.<sup>7</sup> Since the new procedure became effective, the House Administration Committee has increased nine different allowances on 15 separate occasions.<sup>8</sup>

Whether or not the new procedure made it easier to increase allowances, congressional perquisites, of little magnitude as late as 1954, have been growing steadily in recent years. In 1954, a representative could have only three clerks as staff;<sup>9</sup> today he may have up to 16 at combined gross salaries of \$157,092.<sup>10</sup> During the same period simi-

7. 117 CONG. REC. 26447 (remarks of Rep. Dickinson), 26449 (remarks of Rep. Ford) (1971). Since the new procedure went into effect, Rep. Barber B. Conable has introduced resolutions which would permit members of Congress to attend meetings of the House Administration Committee when it is fixing and adjusting allowances. See H.R. Res. 582, 92d Cong., 1st Sess., 117 CONG. REC. 30202 (1971); H.R. Res. 22, 93d Cong., 1st Sess., 119 CONG. REC. H33 (daily ed. Jan. 3, 1973).

8. Order No. 1, 117 CONG. REC. 29526 (1971) (district offices); Revised Order No. 1, 118 CONG. REC. 1293 (1972) (district offices); Revised Order No. 1, 118 CONG. REC. 6122 (1972) (district offices); Order No. 2, 117 CONG. REC. 45608-09 (1971) (trips to district); Revised Order No. 2, 118 CONG. REC. H9315 (daily ed. Oct. 6, 1972) (trips to district); Order No. 3, 118 CONG. REC. 6122 (1972) (number of clerks); Order No. 4, 118 CONG. REC. H9315 (daily ed. Oct. 6, 1972) (stationery); Order No. 5, 119 CONG. REC. H2879 (daily ed. Apr. 18, 1973) (research assistants); Order No. 6, *id.* (use of part of clerk allowance for office equipment); Order No. 7, 119 CONG. REC. H8691 (daily ed. Oct. 4, 1973) (district telephone expense); Order No. 8, *id.* (district office expense); Order No. 9, *id.* (telegram and telephone allowance); Order No. 10, 119 CONG. REC. H10303 (daily ed. Nov. 28, 1973) (stationery); Order No. 11, *id.* (telegram allowance); Order No. 12, 120 CONG. REC. H1470 (daily ed. Mar. 5, 1974) (district offices).

The Senate has fixed its allowances at their January 1, 1973, level, less reductions in three categories. 2 U.S.C.A. §§ 58(b)(1) and (f) (Supp. 1973). Effective January 1, 1973, a senator may allocate the total amount of all allowances among the categories as he wishes. See 118 CONG. REC. S17796 (daily ed. Oct. 12, 1972) (remarks of Senator McClellan). Clerk hire for senators is not included in the lump sum total. Compare 2 U.S.C.A. § 58 (Supp. 1973), with 2 U.S.C.A. § 61-1 (Supp. 1973). After consolidation, the aggregate spent by all senators rose nine percent, *Senate Hearings, supra* note 2, at 563, primarily because of the new allowances for state offices. 2 U.S.C.A. § 58(d) (Supp. 1973).

9. "Clerk" is Congress's generic term for any employee of a representative or senator. H.R.J. Res. of March 3, 1893, 27 Stat. 757, was the first provision for clerks to House members. H.R.J. Res. of Jan. 25, 1923, 42 Stat. 1217, permitted up to two clerks. Act of July 25, 1939, ch. 352, § 1, 53 Stat. 1080, allowed a maximum of three employees. Act of Aug. 5, 1955, ch. 568, § 11(b), 69 Stat. 509, increased from three to eight the number of clerks which each representative could employ at public expense.

For the number of staff authorized from 1955 to 1970, see D. TACHERON & M. UDALL, *THE JOB OF THE CONGRESSMAN* 40\* (1970) [hereinafter cited as TACHERON & UDALL]. On December 7, 1970, the House voted to allow each congressman three more clerks. H.R. Res. 1264, 91st Cong., 2d Sess., 116 CONG. REC. 40186-87 (1970); see note 4 *supra*.

The "basic" compensation for three clerks in 1954 was \$15,000. Act of July 2, 1954, Pub. L. No. 470, 68 Stat. 401. In order to arrive at the total salary which could be paid to staff, pay increases voted between 1944 and the time of payment had to be added to the basic allowance. In 1954, the additions would be calculated as provided in 2 U.S.C.A. §§ 60e-3 to -6 (Supp. 1973). For a discussion of the basic pay system, see TACHERON & UDALL 45-49.

In 1970, this basic pay system was converted to a straightforward gross pay system. 2 U.S.C.A. § 332 (Supp. 1973). The basic allowance for staff of \$34,500 per House member then became a gross allowance of \$133,500. TACHERON & UDALL 45, 48; 116 CONG. REC. 32226 (1970) (remarks of Rep. Broyhill).

10. Order No. 3, *supra* note 8. A representative is allowed \$20,000 in addition to the gross allowance if he designates one of his staff as a research assistant. Order No. 5, *supra* note 8.

Of this allowance, the average House member spent, as of December 31, 1972, \$147,797 for an average number of employees of 12.6. *Hearings on Legislative Branch Appropriations for FY 1974 Before a Subcomm. of the House Comm. on Appropriations*,

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lar growth has occurred in other allowances—stationery,<sup>11</sup> trips to the district or state represented,<sup>12</sup> district or state offices,<sup>13</sup> air mail and

93d Cong., 1st Sess. 1008 (1973) [hereinafter cited as *House Hearings*]. The total estimated expenses of clerks for all representatives for fiscal year 1974 was \$63,262,000. *Id.* at 1007. For calculations of how the average congressional staff uses its time, see J. SALOMA, *CONGRESS AND THE NEW POLITICS* 185 (1969).

The Senate limits staff only by limiting the total salaries that can be paid. Unlike the House, it does not fix a maximum number of employees. The Senate allowance for staff has increased at least 50 percent since 1967. *Compare* Act of July 28, 1967, Pub. L. No. 90-57, 81 Stat. 141, with 2 U.S.C.A. § 61-1 (Supp. 1973). The Senate abandoned the basic pay system in 1967. 2 U.S.C.A. § 61-1(b) (Supp. 1973). The estimated total cost of staff for all senators is \$34,264,925 for fiscal year 1974, equal to the appropriation for fiscal year 1973. *Senate Hearings, supra* note 2, at 563.

11. A representative's stationery allowance is now \$5,250 per year. Order No. 4, Order No. 10, *supra* note 8. It had been \$4,250 from October 6, 1972, to January 21, 1974 (Order No. 4, *supra* note 8); \$3,500 from December 2, 1970, to October 6, 1972 (H.R. Res. 1276, *supra* note 4); \$3,000 a year from October 5, 1966, until December 2, 1970 (H.R. Res. 1029, Oct. 5, 1966, *continued by* H.R. Res. 112, March 8, 1967, *enacted by* Act of May 29, 1967, Pub. L. No. 90-21, 81 Stat. 38); \$2,400 per annum from October 2, 1963, through October 5, 1966 (H.R. Res. 533, October 2, 1963, *enacted by* Act of Aug. 20, 1964, Pub. L. No. 88-454, 78 Stat. 550); \$1,800 yearly from July 12, 1960, to October 2, 1963 (Act of July 12, 1960, Pub. L. No. 86-628, 74 Stat. 452); and, \$1,200 from July 2, 1954, to July 12, 1960 (Act of July 2, 1954, Pub. L. No. 420, 68 Stat. 402). Throughout the late nineteenth and early twentieth centuries, the allowance was \$125 per session of Congress. Act of Feb. 12, 1868, ch. 8, 15 Stat. 35.

The stationery allowance is used by congressmen to buy stationery and other office supplies. TACHERON & UDALL 55. Since it may be withdrawn in cash, it is considered gross income for income tax purposes. *See* Rev. Rul. 126, 1956-1 CUM. BULL. 56 and the more specific ruling at 111 CONG. REC. 16480-81 (1965). The estimated cost of the stationery allowance for all representatives in fiscal year 1974 is \$1,865,750. *House Hearings* 1025.

In 1972, the Senate stationery allowance ranged from \$3,600 to \$5,000, depending on the population of the state represented. Act of Dec. 15, 1971, Pub. L. No. 92-184, 85 Stat. 635. It was then cut in half (2 U.S.C.A. § 58(f)(3) (Supp. 1973)) and consolidated with all the other Senate allowances (2 U.S.C.A. § 58 (Supp. 1973)).

12. A representative may now make 36 round trips per Congress at government expense between Washington and his district. Revised Order No. 2, *supra* note 8. Previous limits were 24 per Congress (Order No. 2, *supra* note 8), one round trip for each month that Congress is in session (Act of Sept. 17, 1967, Pub. L. No. 90-86, 81 Stat. 226), four round trips (Act of Aug. 28, 1965, Pub. L. No. 89-147, 79 Stat. 583), and two round trips per year (Act of July 19, 1963, Pub. L. No. 88-70, 77 Stat. 82). A member may elect a lump-sum payment of \$2,250 instead. Revised Order No. 2, *supra* note 8. For fiscal year 1972, round trips for representatives cost \$830,113.47. *House Hearings, supra* note 10, at 1014.

In addition, one or two members of a congressman's staff may make a total of six round trips per Congress at government expense. Revised Order No. 2, *supra* note 8. The first provision for staff trips home was for two round trips a session in 1965 (Act of Aug. 28, 1965, Pub. L. No. 89-147, 79 Stat. 583).

A senator may be reimbursed per fiscal year for 20 to 22 times the one-way cost of mileage between Washington and his residence; the cost per mile decreases with increased distance from the capital. 2 U.S.C.A. § 58(f)(2) (Supp. 1973), and Act of July 9, 1971, Pub. L. No. 92-51, 85 Stat. 128-29. This is one-half the allowance which was in effect before January 1, 1973. For a discussion of the complex calculation of the cost per mile, see *Hearings on Legislative Branch Appropriations for 1972 Before a Subcomm. of the Sen. Comm. on Appropriations*, 92d Cong., 1st Sess. 565-77 (1971).

In addition to these House and Senate allowances for trips home, each congressman is paid round trip mileage at 20 cents per mile for each regular session of Congress. 2 U.S.C. § 43 (1970).

13. A representative is permitted three rent-free offices, furnished with General Services Administration equipment, at three post office or federal buildings in his district. Revised Order No. 1 of Feb. 29, 1972, *supra* note 8. Two district offices had been allowed since 1952. *See* Act of July 9, 1952, Pub. L. No. 471, 66 Stat. 470, and Act of Sept. 7, 1957, Pub. L. No. 85-301, § 1, 71 Stat. 622. If the congressman must rent office space in his district because space is not available in a post office or federal building he may expend an allowance for rent. Since 1954, this has been,

special delivery stamps,<sup>14</sup> and telephone service.<sup>15</sup> In addition, the House maintains a recording studio<sup>16</sup> where members may produce

per year, \$900 (Act of July 9, 1952, Pub. L. No. 471, 66 Stat. 470), \$1,200 (Act of Sept. 7, 1957, Pub. L. No. 85-301, § 1, 71 Stat. 622), \$2,400 (Act of Sept. 29, 1965, Pub. L. No. 89-211, 79 Stat. 857), and is now \$6,000 if the office leased has "high rental rates" (Order No. 12, *supra* note 8). For fiscal year 1972, the total House expenditure for district office rent was \$578,706.99. *House Hearings, supra* note 10, at 1014.

In addition to the allowance for rent, each representative may draw \$500 quarterly for official office expense incurred "outside the District of Columbia." Order No. 8, *supra* note 8. This sum had been \$300 since 1965 (2 U.S.C.A. § 122a (Supp. 1973)), after beginning at \$150 in 1954 (Act of July 2, 1954, Pub. L. No. 470, 68 Stat. 403). For all House members, district office expenses totaled \$489,477.03 in fiscal year 1972. *House Hearings* 1014.

And along with authorizations for rent and office expenses in the district represented and for telephone expense in Washington (*see* note 15 *infra*), each representative may spend up to \$600 per quarter for telephone expense outside Washington. Order No. 7, *supra* note 8. This sum had been \$450 (H.R. Res. 418, May 18, 1971, enacted by Act of Dec. 15, 1971, Pub. L. No. 92-184, 85 Stat. 636) and \$300 (Act of July 9, 1968, Pub. L. No. 90-392, 82 Stat. 318). The expenditure for district telephone service in fiscal year 1972 was \$530,870.50. *House Hearings* 1014.

Each senator may be reimbursed for three offices in his state, including rent, office, telephone, and periodicals expenses. 2 U.S.C.A. §§ 58(a)(4), (a)(5), (a)(6), (a)(7) (Supp. 1973). These expenses cannot total over \$7,800 a year, with not more than \$3,600 for rent. 2 U.S.C.A. 58(b)(1)(D) (Supp. 1973), and Act of Dec. 15, 1971, Pub. L. No. 92-184, 85 Stat. 634. As late as 1967, senators were limited to two state offices, to \$2,400 per year for rent, to \$1,200 for official office expenses, and to \$1,200 for telephone expense. Act of Sept. 29, 1965, Pub. L. No. 89-211, 79 Stat. 857; Act of July 27, 1965, Pub. L. No. 89-90, 79 Stat. 269; and Act of May 29, 1967, Pub. L. No. 90-21, 81 Stat. 38. The estimated total expense of all state offices maintained by senators for fiscal year 1974 was \$4,491,090. *Senate Hearings, supra* note 2, at 567.

14. House members may use up to \$910 of air mail and special delivery stamps in connection with official business. 2 U.S.C.A. §§ 42, 42c (Supp. 1973). From 1964 to 1968, the total allowance was \$500. Act of Aug. 20, 1964, Pub. L. No. 88-454, 78 Stat. 550 (enacting H.R. Res. 532 of Oct. 2, 1963); Act of July 9, 1968, Pub. L. No. 90-392, 82 Stat. 318 (enacting H.R. Res. 1003, effective Jan. 3, 1968). The expenditure for these stamps for all representatives aggregated \$417,510 for calendar year 1973 and was estimated to be \$419,330 for fiscal year 1974. *House Hearings, supra* note 10, at 1026.

For air mail and special delivery postage, senators received \$1,215 for fiscal year 1972, with an additional \$305 per year for senators from states west of the Mississippi. Act of July 9, 1971, Pub. L. No. 92-51, 85 Stat. 128. The 1972 consolidation of all Senate allowances reduced this allowance by one-half; effective January 1, 1973, \$607.50 is the basic Senate postage allowance, with \$152.50 added for western senators. 2 U.S.C.A. § 58(f)(1) (Supp. 1973). The total cost of Senate postage had reached \$138,625 in fiscal year 1973. *Senate Hearings, supra* note 2, at 563. The fiscal year 1974 estimate is \$80,645. *Id.* at 666.

15. By Order No. 9, *supra* note 8, the House permits each member 100,000 units of telegrams and long distance telephone calls each year. (One minute of a long distance call counts as four units; one word of a telegram as two units). 2 U.S.C.A. § 46g (Supp. 1973); Order No. 11, *supra* note 8. This is double the 1964 allowance of units, which was 50,000 each year. Act of Aug. 20, 1964, Pub. L. No. 88-454, 78 Stat. 550 (enacting H.R. Res. 531 of Oct. 2, 1963). In addition, the definition of a unit changed in 1965. A long distance call, previously five units, became four units per minute. *See* S. REP. NO. 571, 89th Cong., 1st Sess. (1965); Act of Aug. 21, 1965, Pub. L. No. 89-131, 79 Stat. 544. The estimate for fiscal year 1974 telephone expense for all representatives is \$4.5 million, compared to \$4.0 million in fiscal year 1973. *House Hearings, supra* note 10, at 1023.

This total expense includes payment to the General Services Administration for Federal Telecommunications Service (F.T.S.), free long distance telephone service to anywhere in the country from 5 p.m. until 9 a.m. weekdays, and for all day on weekends and holidays. *Id.* at 1024. Almost all Washington congressional offices are linked to F.T.S. *Hearings on Legislative Branch Appropriations for 1970 Before a Subcomm. of the House Appropriations Comm., 91st Cong., 1st Sess.* 468 (1969).

For details of the Senate telephone allowance, *see* note 2 *supra*.

16. 2 U.S.C. § 123b (1970). The cost of the House Recording Studio was about \$248,771 in fiscal year 1973. *Hearings on Legislative Branch Appropriations for 1973*

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television and radio tapes at reduced cost<sup>17</sup> and the House subsidizes a private printing service.<sup>18</sup>

No doubt, Congress needs these resources in order to legislate, investigate, and serve constituents.<sup>19</sup> But, at the same time, these benefits of office have the political effect of bolstering incumbents.<sup>20</sup>

This Note addresses the question of how to resolve this basic conflict in regard to one perquisite, the congressional franking privilege.<sup>21</sup> By affixing their signatures, members of the House and Senate<sup>22</sup> may

*Before a Subcomm. of the House Appropriations Comm.*, 92d Cong., 2d Sess. 745 (1972). For a discussion of the operation of the House Studio, see *Hearings on Legislative Branch Appropriations for 1970 Before a Subcomm. of the House Appropriations Comm.*, *supra* note 15, at 410-13.

A 1967 survey of members' use concluded that the average member made 8.0 radio appearances and 4.0 television appearances per month during the session; 56 percent of a sample of House members gave regular radio or television reports. J. SALOMA, *supra* note 10, at 174.

17. See D. BERMAN, *IN CONGRESS ASSEMBLED: THE LEGISLATIVE PROCESS IN THE NATIONAL GOVERNMENT* 19 (1964) [hereinafter cited as *IN CONGRESS ASSEMBLED*]; M. GREEN, J. FALLOWS, & D. ZWICK, *WHO RUNS CONGRESS?* 240 (1972); W. WEAVER, *BOTH YOUR HOUSES: THE TRUTH ABOUT CONGRESS* 194 (1972) [hereinafter cited as *BOTH YOUR HOUSES*]. For the laws governing charges and billing, see 2 U.S.C. § 123b(d) (1970).

18. Each year the House appropriates salaries of around \$22,000 for "two printing clerks, one for the majority caucus room and one for the minority caucus room." *House Hearings*, *supra* note 10, at 1001. These two clerks are independent businessmen who buy their own equipment and supplies, hire workers, and sell their printing services to members. *Hearings on Legislative Branch Appropriations for 1973 Before a Subcomm. of the House Appropriations Comm.*, *supra* note 16, at 762-63. The House provides rent-free space and all utilities. *Hearings on Legislative Branch Appropriations for 1970 Before a Subcomm. of the House Appropriations Comm.*, *supra* note 15, at 437. See generally *id.* at 435-37, and 30 CONG. Q.W. REP. 2064 (1972).

19. J. SALOMA, *supra* note 10, at 159-68. See also the discussions in the *Congressional Record* accompanying the increases in allowances discussed at pp. 1055-58 *supra*.

For arguments that the Senate perquisites are inadequate, see *Senate Hearings*, *supra* note 2, at 671-90. For the same argument on the House side, see 118 CONG. REC. E5165-66 (daily ed. May 11, 1972). For comparison of the congressional allowances with their equivalents in the executive branch, see *Senate Hearings* 180, 683; *Hearings on H.R. 3180 Before the Special Ad Hoc Subcomm. of the House Post Office and Civil Service Comm.*, 93d Cong., 1st Sess. 98 (1973) [hereinafter cited as *House Franking Hearings*], and compare the discussion in note 205 *infra*.

20. C.L. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT* 331 (1963); M. KIRWAN, *HOW TO SUCCEED IN POLITICS* 20 (1964); D. LEUTHOLD, *ELECTIONEERING IN A DEMOCRACY: CAMPAIGNS FOR CONGRESS* 131 (1968); TWENTIETH CENTURY FUND TASK FORCE, *ELECTING CONGRESS* 35-36 (1970); *IN CONGRESS ASSEMBLED*, *supra* note 17, at 22; *BUSINESS WEEK*, Sept. 15, 1962, at 31; 30 CONG. Q.W. REP. 2066 (1972); *N.Y. Times*, Feb. 15, 1974, at 35, col. 1; *Wall St. J.*, Oct. 2, 1973, at 1, col. 1.

Political scientists have identified the increase in perquisites as one factor explaining the doubling of the average congressman's tenure since 1900. R. DAVIDSON, *THE ROLE OF THE CONGRESSMAN* 60-65 (1969); *cf.* M. CUMMINGS, JR., *CONGRESSMAN AND ELECTORATE* 68-72 (1972).

21. "[F]rank" means the autographic or facsimile signature of persons authorized . . . to transmit matter through the mail without prepayment of postage.

39 U.S.C. § 3201(3) (1970).

For the history of the congressional franking privilege, see E. STERN, *HISTORY OF THE "FREE FRANKING" OF MAIL IN THE UNITED STATES* 1-12 (1936); U.S. POST OFFICE DEP'T, *POSTAGE RATES 1789-1930*, at 31-51 (1930); U.S. POST OFFICE DEP'T, *POSTAGE RATES 1930-1944*, at 11-16 (1944); Note, *Use and Abuse of the Congressional Franking Privilege*, 5 LOYOLA L.A.L. REV. 52, 54-56 (1972); pp. 1072-74 *infra*.

22. Others possess a franking privilege. Former presidents and their surviving spouses may send their nonpolitical mail free. 39 U.S.C. § 3214 (1970), *as amended by* Act of Dec. 18, 1973, Pub. L. No. 93-191, § 4, 87 Stat. 737. The surviving spouse of a member of Congress may for 180 days after the member's death frank any non-

send certain matter free through the mail.<sup>23</sup> This allowance deserves special attention because it was the subject of 14 lawsuits in 1972, of an Act of Congress in 1973, and will probably be the subject of a rash of suits in 1974.<sup>24</sup> As in the case of the other perquisites, the franking privilege solves a particular need—the need for communication between representative and constituent. Just as it pays for other congressional expenses, the government should pay for postage;<sup>25</sup> part of a representative's job is to inform and communicate with constituents.<sup>26</sup> The officeholder cannot and should not bear this public cost.<sup>27</sup>

But use of the frank harms challengers, the supporters of chal-

political correspondence related to the death of the member. 39 U.S.C. § 3218 (1970), as amended by Act of Dec. 18, 1973, Pub. L. No. 93-191, § 11, 87 Stat. 737. The vice president and the nonelected officers of the House and Senate may frank official correspondence and documents just as members of Congress may. 39 U.S.C. §§ 3210-11 (1970), as amended by Act of Dec. 18, 1973, Pub. L. No. 93-191, 87 Stat. 737.

The executive and judicial branches may send official mail free. 39 U.S.C. § 3202 (1970). This privilege is called "penalty mail," because the penalty for unlawful use to avoid payment of postage must be stated on the envelope or cover. 39 U.S.C. § 3206 (1970).

Members of the armed forces may mail personal correspondence free, if they are in a war zone or are hospitalized as a result of service in a war zone. 39 U.S.C. § 3401(a) (1970).

23. For a description of the type of matter that may by law be franked, see p. 1063 *infra*. For a description of what is in practice franked, see notes 206-18 *infra*.

24. See *House Franking Hearings*, *supra* note 19, at 59.

25. Mailings under the franking privilege have increased greatly in recent years, both in number of pieces and in cost. For the number of pieces of franked mail for each year between 1954 and 1972, see *Hearings on Legislative Branch Appropriations for 1973 Before a Subcomm. of the Sen. Appropriations Comm.*, 92d Cong., 2d Sess. 453 (1972). For the years between 1930 and 1940, see 87 CONG. REC. 9417 (1941).

The number of pieces franked in fiscal years 1972, 1973, and 1974 were 308.9 million, 326.3 million (revised estimate), and 353.9 million (estimate). *House Hearings*, *supra* note 10, at 1067-68. Part of the increase across these years is the increased accuracy of the Postal Service in counting pieces. *Id.*; H.R. REP. NO. 88, 93d Cong., 1st Sess. 7-8 (1973); *Hearings on H.R. 3180 Before the Sen. Post Office and Civil Service Comm.*, 93d Cong., 1st Sess. 67-73 (1973) [hereinafter cited as *Senate Franking Hearings*].

The costs for fiscal years 1972, 1973, and 1974 were \$24.7 million, \$26.1 million (revised estimate), and \$35.7 million (estimate). *House Hearings* 1067-68. Beginning in 1974, the Postal Service will permit franked mail to be classified, which means that Congress will for the first time reimburse the Service at less than first class rates. *Senate Franking Hearings* 69, 72.

26. TACHERON & UDALL, *supra* note 9, at 74-82 discuss the normal flow of mail that must be answered; they also describe how a representative may inform and educate his constituents, *id.* at 115-25, so that his mail encourages mail to him, *id.* at 95. For analysis of this argument, see p. 1090 *infra*. See also *United States v. Gravel*, 408 U.S. 606, 648 (1972) (Brennan, J., dissenting); *id.* at 633 (Douglas, J., dissenting); *House Franking Hearings*, *supra* note 19, at 20, 64; J. KIRBY, CONGRESS AND THE PUBLIC TRUST 11 (1972) [hereinafter cited as *THE PUBLIC TRUST*].

27. Project, *Post Office*, 41 S. CAL. L. REV. 643, 657-58 (1968); Note, *supra* note 21, at 56.

The average cost of the franking privilege per member in fiscal year 1972 was \$46,000. *House Hearings*, *supra* note 10, at 1067. The average cost per member in fiscal year 1974 will be about \$71,000. *House Franking Hearings*, *supra* note 19, at 89. Either cost exceeds a member's salary for either year. 2 U.S.C.A. § 31 (1973).

lengers, and the interest of the public in fair elections.<sup>28</sup> The \$46,000 that the average member of Congress spent in 1972 in order to frank mail was one-and-one-half times the total campaign fund of the average major party challenger to a United States Representative.<sup>29</sup> Thus, it is not surprising that opponents complain that the use of the frank strengthens the incumbent politically.<sup>30</sup> In addition, the normal political effect of direct mailings is amplified by the relatively small size of the congressional district<sup>31</sup> and by the fact that television focuses little on the representative.<sup>32</sup> In many districts a steady stream of mail

28. The Supreme Court has made clear that the interest of society in fair elections is constitutionally protected in terms of both the individual's Fourteenth Amendment right to vote and his First Amendment right to associate. "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968). This interest in fair elections has been described as, "Competition among candidates determined as largely as possible on the basis of their qualities and views, rather than distorted by inequality of opportunity to communicate with voters." A. ROSENTHAL, *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 9-10 (1972); cf. *Burroughs & Cannon v. United States*, 290 U.S. 534, 548 (1934) (state's interest in requiring disclosure of campaign expenditures is a compelling state interest because of need for fair elections); *Pichler v. Jennings*, 347 F. Supp. 1061, 1068-69 (S.D.N.Y. 1972).

29. The average major party challenger for a House seat raised \$30,000 in 1972. *N.Y. Times*, Sept. 14, 1973, at 17, col. 1.

30. See the cases cited in note 35 *infra* for the complaints. Because Senate challengers raise eight times as much for campaign expenses as House challengers, *N.Y. Times*, Sept. 14, 1973, at 17, col. 1, few complain that senators use the frank as a political tool. Rather, the standard complaint about the frank in the upper body is that a senator has loaned his frank to a group in order to lower its cost of postage. 116 CONG. REC. 16521, 16534-35, 17834-35, 18029, 18091 (1970) (accusations that liberal senators used the frank to solicit funds for antiwar groups); cf. 100 CONG. REC. 16196 (1954) (accusation that Senator Joseph R. McCarthy franked press releases all over the country); 99 CONG. REC. 6386-91, 6459-61 (1953) (Senator McCarthy accuses Senator Herbert Lehman of franking 100,000 copies of a speech all over the nation attacking him) (see *NEWSWEEK*, June 22, 1953, at 26, for an analysis of this accusation).

In the early part of this century, senators used the frank to strengthen their political positions more than they do presently. 67 CONG. REC. 10392-93, 12463 (1926); 53 CONG. REC. 13916-19 (1916). *But cf.* 67 CONG. REC. 10392-93 (1926); 64 CONG. REC. 4627 (1923); 58 CONG. REC. 3853-54 (1919); 40 CONG. REC. 4751-54 (1906); *THE OUTLOOK*, Oct. 31, 1917, at 329.

Within the last 20 years, in direct contrast to complaints about senators, no one has complained that representatives have "loaned" the frank to a group for use as free postage. *But cf.* *NEW REPUBLIC*, Jan. 3, 1970, at 9. House members did loan the frank in at least two celebrated cases: *The America First Committee* (see 88 CONG. REC. 9462 (1942); 87 CONG. REC. 8207 (1941); *NEWSWEEK*, Oct. 20, 1941, at 21-22); and the Committee for Constitutional Government (see *Hearings on Committee for Constitutional Government Before the House Select Comm. on Lobbying*, 81st Cong., 2d Sess., pt. 5, at 97-101 (1950); 96 CONG. REC. A4902-03, A6750 (1950)). For an older, less famous case, see 54 CONG. REC. 1760-61 (1917).

This Note does not discuss the problem of loaning the frank. Examples of such loans are rare, particularly in the House; criticism by colleagues seems an adequate deterrent and punishment; and, a statute makes such loans illegal. 39 U.S.C. § 3216 (1970).

31. The average House district in the 93d Congress contains 465,000 people. Of the 429 seats in multi-member states, 371 have between 450,000 and 500,000; 16 have greater than 500,000; 33 have between 400,000 and 450,000; 5 have between 350,000 and 400,000; and 4 have less than 350,000. BUREAU OF THE CENSUS, *DEPT OF COMMERCE*, 1970 POPULATIONS OF CONGRESSIONAL DISTRICTS FOR THE 93D CONGRESS 1-2 (1972).

32. See *THE PUBLIC TRUST*, *supra* note 26, at 140; *BOTH YOUR HOUSES*, *supra* note 17, at 195.

paints the picture of a working congressman.<sup>33</sup> For all these reasons the popular political belief that the use of the frank is a key to re-election seems true for members of the House of Representatives.<sup>34</sup>

The need for fair elections thus conflicts with the need for subsidizing communication between representative and constituent. The rest of this Note examines different ways in which the courts and the Congress have attempted to reconcile these needs. First, judicial attempts from 1968 to 1972 to resolve the problem by interpretation of a now-superseded statute are reviewed. Next, the solution which Congress enacted into law in 1973 is examined. Then, four other traditional proposals are considered. Finally, the Note offers a proposal to allow the political market to balance competition with communication.

# I. The Need for a New Statute: Judicial Interpretation of the Old Franking Privilege Statute

In 1968, 1970, and 1972, 17 challengers<sup>35</sup> to representatives turned to the courts<sup>36</sup> seeking to restrain a representative's use of his franking

33. THE PUBLIC TRUST 25; BOTH YOUR HOUSES 193; IN CONGRESS ASSEMBLED, *supra* note 17, at 23; Wall St. J., March 6, 1973, at 37, col. 4.

34. *House Franking Hearings*, *supra* note 19, at 58; Wall St. J., Aug. 4, 1969, at 1, col. 1; N.Y. Times, Nov. 5, 1950, § 6 (magazine), at 22.

35. 1968: *Straus v. Gilbert*, 293 F. Supp. 214 (S.D.N.Y. 1968); 1970: *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970); 1972: *Adams v. Fulton*, Civ. Action No. 6761 (M.D. Tenn., dismissed as moot Dec. 7, 1972), summarized in JT. COMM. ON CONG. OPERATIONS, FINAL REPORT IDENTIFYING PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS, 92d Cong., 2d Sess. 65 (1972) [hereinafter cited as JT. COMM. REP.]; *Novak v. Goldwater*, Civ. Action No. 72-2579 (C.D. Cal., settled out of court Nov. 9, 1972), reported in JT. COMM. REP. 66; *Austin v. Nedzi*, Civ. Action No. 38488 (E.D. Mich., summary judgment for defendant July 17, 1972), reported in JT. COMM. REP. 70; *Lamkin v. Shipley*, Civ. Action No. CV 72-173 (E.D. Ill., defendant filed for summary judgment, Nov. 28, 1972), reported in JT. COMM. REP. 60; *Caprio v. Wilson*, Civ. Action No. 72-443-GT (S.D. Cal., pending Nov. 20, 1972), reported in JT. COMM. REP. 68; *Stempien v. Esch*, Civ. Action No. 72-217762-CZ (Mich. Wayne Co. Cir. Ct. Sept. 26, 1972), reported in JT. COMM. REP. 70; *Ruppert v. Powell*, Civ. Action No. 8579 (S.D. Ohio Nov. 8, 1972), opinion printed in full in JT. COMM. REP. 165; *Galasso v. Collier*, Civ. Action No. 72-C-2570 (N.D. Ill. Nov. 28, 1972), reported in JT. COMM. REP. 69; *Kucinich v. Minshall*, Civ. Action No. 72-1145 (N.D. Ohio Oct. 28, 1972), oral opinion printed in JT. COMM. REP. 64; *Belardino v. Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972); *Levy v. Abzug*, 355 F. Supp. 1299 (S.D.N.Y. 1972); *Bowie v. Williams*, 351 F. Supp. 628 (E.D. Pa. 1972); *Schiaffo v. Helstoski*, 350 F. Supp. 1076 (D.N.J. 1972); *VanHecke v. Reuss*, 350 F. Supp. 21 (E.D. Wis. 1972); *Hoellen v. Annunzio*, 348 F. Supp. 305 (N.D. Ill.), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973).

*Straus v. Gilbert* and *Rising v. Brown* are noted in Note, *supra* note 21, at 69-79. *Straus*, *Rising*, *Hoellen v. Annunzio*, and *Schiaffo v. Helstoski* are noted at 4 LOYOLA CHI. L.J. 513 (1973).

The only reported case before 1968 concerning the franking privilege was *Dewees' Case*, 7 Fed. Cas. No. 3,848 (C.C.N.C. 1869). In that case, under a previous franking privilege statute, Act of March 3, 1825, ch. 64, § 28, 4 Stat. 110, an indictment for leasing the frank to a businessman was dismissed as stating no indictable offense. (This Act was repealed in 1873. Act of Jan. 31, 1873, ch. 82, 17 Stat. 421. The history of the statute since 1873 is discussed at pp. 1072-74 *infra*.)

36. In addition, nine candidates also complained to the Fair Campaign Practices Committee (FCPC), a private organization, about an incumbent's use of the frank. Jr.



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privilege.<sup>37</sup> The plaintiffs alleged that the representatives were abusing the franking privilege by using it for campaign purposes.<sup>38</sup> The language of the statute then authorizing the franking privilege allowed members of Congress to send as franked mail "correspondence . . . upon official business to any person."<sup>39</sup> The challengers argued that campaign literature could not be official congressional business. In some cases the challengers objected to mailings which were reprints of the *Congressional Record*, agricultural publications, or public documents printed by order of Congress. The franking of each of these is governed by a separate statutory authorization,<sup>40</sup> which contains no official business limitation. The challengers then argued that these statutes implicitly forbade free mailing of nonofficial material.<sup>41</sup> As relief, plaintiffs sought injunctions against further mailings; some also asked for declaratory judgments,<sup>42</sup> damages,<sup>43</sup> or accountings to the

COMM. ON CONG. OPERATIONS, SPECIAL REPORT ON THE FRANKING PRIVILEGE OF MEMBERS OF CONGRESS, 92d Cong., 2d Sess. 69 (1972). For a description of the operation of the FCPC, see *House Franking Hearings*, *supra* note 19, at 61.

37. The 16 who sued in federal court alleged jurisdiction under the act granting district courts "original jurisdiction of any civil action arising under any Act of Congress relating to the postal service." 28 U.S.C. § 1339 (1970). The courts unanimously and without debate recognized this claim to subject-matter jurisdiction. See the cases in note 35 *supra*.

One challenger sued in state court to enjoin any representation by the incumbent in his mailings that he represented a newly-added part of his district: The congressman would not represent this area until the January following the election in November. The suit resulted in a permanent injunction against such representations. *Stempien v. Esch*, Civ. Action No. 72-217762-CZ (Mich. Wayne Co. Cir. Ct. Sept. 26, 1972), *reported in* JR. COMM. REP., *supra* note 35, at 70.

Similar causes for misrepresentation failed in federal court for want of jurisdiction. *Belardino v. Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972); *Levy v. Abzug*, 355 F. Supp. 1299 (S.D.N.Y. 1972).

38. See, e.g., *Hoellen v. Annunzio*, 348 F. Supp. 305, 311 (N.D. Ill. 1972).

39. 39 U.S.C. § 3210 (1970). This section was amended by Act of Dec. 18, 1973, Pub. L. No. 93-191, 87 Stat. 737; the Act is discussed in detail at pp. 1074-88 *infra*.

40. The Vice President, Members of Congress, . . . may send and receive as franked mail all public documents printed by order of Congress.

39 U.S.C. § 3211 (1970).

Members of Congress may send as franked mail the *Congressional Record*, or any part thereof, or speeches or reports therein contained.

39 U.S.C. § 3212 (1970).

Seeds and agricultural reports emanating from the Department of Agriculture may be mailed . . . as franked mail by Members of Congress.

39 U.S.C. § 3213 (1970). The only significant change which the Act of Dec. 18, 1973, Pub. L. No. 93-191, 87 Stat. 737, makes in these three sections is discussed in note 131 *infra*.

41. See, e.g., *Bowie v. Williams*, 351 F. Supp. 628, 630 (E.D. Pa. 1972); *Straus v. Gilbert*, 293 F. Supp. 214, 215-16 (S.D.N.Y. 1968).

42. See *Ruppert v. Powell*, Civ. Action No. 8579 (S.D. Ohio Nov. 8, 1972), *opinion printed in full in* JR. COMM. REP., *supra* note 35, at 165.

43. In *Bowie v. Williams*, 351 F. Supp. at 630-31, plaintiff sought \$297,000 to be paid to the Postal Service (the cost of franking 35 newsletters from 1967 to 1972), \$300,000 punitive damages to be paid to the government, and \$297,000 to be paid to the plaintiff.

*Schiaffo v. Helstoski*, 350 F. Supp. 1076, 1097 (D.N.J. 1972), notes that imposing damages would interfere with the workings of Congress and constitute an unfair windfall to the plaintiff. It thus holds an injunction to be the proper relief.

Postal Service.<sup>44</sup> Although the theories of the plaintiffs were similar, the district courts took divergent views as to the merits.

### A. *Judicial Deference to the Legislature*

All the reported decisions recognized that the plaintiff-challenger had standing to complain about the incumbent's use of the frank.<sup>45</sup> The next issue which the courts had to resolve was whether the complaints presented political questions. One court<sup>46</sup> held that use of the franking privilege was an exercise of congressional speech or debate, which the Constitution forbids courts to question in any way.<sup>47</sup> At least one other court<sup>48</sup> refused to examine the merits, holding that such an examination would violate general separation-of-powers principles.<sup>49</sup>

A holding that the speech or debate clause forbids any judicial inquiry about the franking privilege finds support in dicta in the few Supreme Court cases which have considered the clause. These cases suggest that a representative cannot be questioned about whatever he does in discharge of his office.<sup>50</sup> And, in discharge of his office,

44. One court held that plaintiff lacked standing to recover funds for the Postal Service. *Levy v. Abzug*, 355 F. Supp. 1299, 1300 (S.D.N.Y. 1972), citing *Hickey v. Illinois Central R.R.*, 278 F.2d 529 (7th Cir. 1960). But where the plaintiff sought only an injunction, one court spoke as if he could recover damages for the Postal Service. *Rising v. Brown*, 313 F. Supp. 824, 826 (C.D. Cal. 1970); cf. *Hoellen v. Annunzio*, 348 F. Supp. 305, 311 (N.D. Ill. 1972).

45. Without any discussion of the issue, most of the district courts assumed that the plaintiff had standing. See the cases cited in note 35 *supra*. They probably assumed what three courts made explicit: That the plaintiff-challenger was an appropriate person to assert the public's interest in fair elections, which the congressman's use of the frank under the statute may have harmed. *Schiaffo v. Helstoski*, 350 F. Supp. at 1083-84; *Hoellen v. Annunzio*, 348 F. Supp. at 311; *Rising v. Brown*, 313 F. Supp. at 826.

46. *Ruppert v. Powell*, Civ. Action No. 8579 (S.D. Ohio Nov. 8, 1972), in *JT. COMM. REP.*, *supra* note 35, at 166-67.

47. For any speech or debate in either house, they [senators and representatives] shall not be questioned in any other place.  
U.S. CONST. art. I, § 6.

48. *Galasso v. Collier*, Civ. Action No. 72-C-2570 (N.D. Ill. Nov. 28, 1972), reported in *JT. COMM. REP.* 69; cf. *Bowie v. Williams*, 351 F. Supp. at 634-35; *Straus v. Gilbert*, 293 F. Supp. at 216.

49. *Galasso v. Collier*, Civ. Action No. 72-C-2570 (N.D. Ill. Nov. 28, 1972), reported in *JT. COMM. REP.* 69, did not state clearly what separation-of-powers principle made the issue a political question. Apparently, the principle was what the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962), labeled the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government.

50. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1888), states that the clause extends to "things generally done in a session of the House by one of its members in relation to the business before it." The first comment on the speech or debate clause, which the Supreme Court has often cited, was made by a state court on a state constitution's speech or debate clause similar to the federal clause. That opinion said in dictum that the clause covered acts "resulting from the nature, and in the execution, of the office." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). See also *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951).

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the congressman does answer mail, send press releases, newsletters, and questionnaires, and in other ways use the frank.

However, dicta aside, the cases which discuss the speech or debate clause apply its immunity only to clearly legislative activities.<sup>51</sup> *United States v. Brewster*<sup>52</sup> specified which activities the clause protected and which it did not. Those without immunity resemble the typical use of the franking privilege.

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech Or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, *preparing so-called newsletters to constituents, news releases*, and speeches delivered outside the Congress. . . . Although these are entirely legitimate activities they are political in nature rather than legislative. . . . [I]t has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech Or Debate Clause.<sup>53</sup>

51. Thus, despite *Coffin's* broad, much-quoted language, *see* note 50 *supra*, the legislator in that case was held liable for defamatory remarks, casually made on the floor of the Massachusetts legislature and not contained in a formal speech. 4 Mass. at 28. *See* *United States v. Brewster*, 408 U.S. 501, 514 n.8 (1972); Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L.J. 366, 367 (1967).

In *Kilbourn v. Thompson*, legislators were held immune from suit for writing a committee report and for voting and speaking for a contempt resolution; the suit for the false imprisonment which occurred in enforcing the resolution could be sustained only against the Doorkeeper of the House, an employee. 103 U.S. 168, 205 (1888). *See* *Doe v. McMillan*, 412 U.S. 306 (1973) (members of the House and their staffs are absolutely immune for authorizing publication of a House committee report; but the Public Printer and Superintendent of Documents are not immune from suit or injunction for distribution beyond the legislative needs of Congress); *Powell v. McCormack*, 395 U.S. 486 (1969) (voting on a resolution is protected activity); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (gathering evidence for subcommittee investigations is immune from civil suit); *United States v. Johnson*, 383 U.S. 169, 184-85 (1966) (a speech on the floor and details of its preparation cannot be used as evidence in a bribery case); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislative committee is immune from suit for damages to a citizen as a result of its investigation); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) (House members are absolutely immune for filing a committee report with the speaker, discussing it on the floor, and inserting it in the *Congressional Record*; but the Public Printer and the Superintendent of Documents can be enjoined from printing the report and distributing it outside Congress); *Consumers Union v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18 (D.D.C. 1973) (the Sergeants-at-Arms of the House and Senate are not immune from suit for barring representatives of certain publications from the press galleries).

52. 408 U.S. 501 (1972). In *Brewster*, a former United States senator was charged with accepting bribes from a mail-order house in return for his vote and lobbying efforts against postage rate legislation. 18 U.S.C. §§ 201(c)(1), 201(g) (1970). The district court held *Brewster* immune from prosecution because of the speech or debate clause. The Supreme Court reversed, holding that the clause "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." 408 U.S. at 528.

53. 408 U.S. at 512 (emphasis added).

Likewise, *United States v. Gravel*<sup>54</sup> held that legislative immunity did not cover disseminating information to the public. The Court held Senator Gravel immune from prosecution for having read top secret documents, the Pentagon Papers, into the record of the Senate Subcommittee on Buildings and Grounds; but it held that he could be prosecuted for, and must answer grand jury questions about, his acquisition of the papers and his arrangements to publish them with a private publisher.<sup>55</sup> This ruling followed a line of cases involving defamatory remarks spoken on the floor of Congress and printed initially in the *Congressional Record*. In these cases congressmen have been held immune from suit for statements on the floor and publication in the *Congressional Record*, but not immune for private republication and dissemination.<sup>56</sup> In sum, the speech or debate clause does not bar all suits about use of the frank because its use involves republication and dissemination of congressional speech or debate.<sup>57</sup>

Although scholarly<sup>58</sup> and congressional<sup>59</sup> comment has criticized these decisions on the speech or debate clause, even the critics suggest

54. 408 U.S. 606 (1972).

55. *Id.* at 616. Gravel did not attempt to read the Pentagon Papers into the *Congressional Record* at the time that he held the subcommittee meeting. Ten months later, when he attempted to insert part of them into the *Record*, he failed to receive unanimous consent and so no part of the Pentagon Papers appeared in the *Congressional Record*. See Rheinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1152 n.205 (1973) [hereinafter cited as *Legislative Privilege*]. Note, *Brewster, Gravel, and Legislative Immunity*, 73 COLUM. L. REV. 125, 138 (1973) [hereinafter cited as *Legislative Immunity*], errs in asserting that the issue before the Supreme Court in *Gravel* concerned republication of material that had appeared in the *Congressional Record*. See also 408 U.S. at 610 n.6.

56. See, e.g., *Long v. Ansell*, 69 F.2d 386 (D.C. Cir.), *aff'd on other grounds*, 293 U.S. 76 (1934); cf. *McGovern v. Martz*, 182 F. Supp. 343, 347-48 (D.D.C. 1960). A congressman cannot be held liable for defamatory remarks spoken on the floor, as long as he does not disseminate them. *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930). See *Doe v. McMillan*, 412 U.S. 306 (1973); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

This distinction originates historically in the case of *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1156 (Q.B. 1839). See *United States v. Gravel*, 408 U.S. 606, 623 n.14 (1972); Simmons, *Freedom of Speech in Congress: The History of a Constitutional Clause*, 38 A.B.A.J. 649, 708 (1952). For a full discussion of the original publication-dissemination distinction, see *Legislative Immunity*, *supra* note 55, at 134-37.

57. *Accord*, *Annunzio v. Hoellen*, 468 F.2d 522, 526 n.7, 527 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973); cf. *Schiaffo v. Helstoski*, 350 F. Supp. 1076, 1085 (D.N.J. 1972).

The Supreme Court may have discussed this very issue in *Gravel*. Note Justice Douglas's statement in dissent:

As to Senator Gravel's efforts to publish the subcommittee's record's content, wide dissemination of this material is as much a part of the Speech or Debate philosophy as mailing under the frank a senator's or congressman's speech.

408 U.S. at 636.

58. See, e.g., *Legislative Privilege*, *supra* note 55; *Legislative Immunity*, *supra* note 55; Velvel, *The Supreme Court Tramples Gravel*, 61 KY. L.J. 525, 532 (1972) (criticizing *Gravel* but approving *Brewster*).

59. See Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973) (originally published at 118 CONG. REC. S13610-12 (daily ed. Aug. 16, 1972)). See generally *Hearings on Congressional Immunity of Members of Congress Before the Jt. Comm. on Cong. Operations*, 93d Cong., 1st Sess. (1973).

that courts should hear civil suits by private persons alleging violations of their statutory and constitutional rights.<sup>60</sup> The traditional justification for congressional speech immunity<sup>61</sup>—to prevent executive retaliation for and censorship of legislative acts—does not apply when legislators infringe the statutory or constitutional rights of private citizens. Thus, the viewpoints of both proponents and opponents of *Brewster* and *Gravel* permit suits for abuse of the franking privilege.

The wider holding that general separation-of-powers principles preclude any judicial review is also incorrect. The underlying rationale of the argument is that communication between representative and citizen is a necessary legislative act<sup>62</sup> and that Congress alone can define when such communication should occur. If courts tell Congress what it can communicate, they are exercising a power which is Congress's and not the courts'.<sup>63</sup>

This rationale fails, in the first place, because the courts in the 1972 cases were performing a typically judicial function—statutory interpretation.<sup>64</sup> In the second place, courts do not grant separation-of-powers principles this much weight in regard to similar acts by Congress and congressmen. In *Powell v. McCormack*<sup>65</sup> the Supreme Court held that it could review Congress's exclusion of a member in the face of claims that Congress had exclusive power to judge the elections and qualifications of its members and to punish them for disorderly behavior.<sup>66</sup> *Powell* demonstrated that separation-of-powers principles permitted review of actions of the whole House. Therefore, separation-of-powers doctrine permits adjudication of the lesser issues involved in a congressman's use of his frank.

Thus, judicial precedent suggests that suits about the frank do not raise political questions; permitting courts to reach the merits is also

60. *Legislative Privilege*, *supra* note 55, at 1174. See also Note, *supra* note 51, at 384.

61. See *United States v. Gravel*, 408 U.S. 606, 616 (1972); *United States v. Brewster*, 408 U.S. 501, 507-09 (1972); *United States v. Johnson*, 383 U.S. 169, 183 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). For a view of the justification of the clause, which is contrary to what the Supreme Court accepts but which permits suits by private persons against legislators, see *Legislative Privilege* 1121-46.

62. *Bowie v. Williams*, 351 F. Supp. at 631-32; *Ruppert v. Powell*, Civ. Action No. 8579 (S.D. Ohio Nov. 8, 1972), reported in JT. COMM. REP., *supra* note 35, at 166-67; *Kucinich v. Minshall*, Civ. Action No. 72-1145 (N.D. Ohio, Oct. 28, 1972), oral opinion printed in JT. COMM. REP. 64; *Straus v. Gilbert*, 293 F. Supp. at 216.

The authority usually cited is *McGovern v. Martz*, 182 F. Supp. 343, 348 (D.D.C. 1960), which on a closer reading may support a position opposite from that for which these courts cite it. See discussion in note 56 *supra*.

63. *Ruppert v. Powell*, in JT. COMM. REP. 167; *Galasso v. Collier*, Civ. Action No. 72-C-2570 (N.D. Ill. Nov. 28, 1972), reported in JT. COMM. REP. 69; *Kucinich v. Minshall*, in JT. COMM. REP. 64; *Bowie v. Williams*, 351 F. Supp. at 631-35; *Straus v. Gilbert*, 293 F. Supp. at 216.

64. See *Annunzio v. Hoellen*, 468 F.2d at 525; *Schiaffo v. Helstoski*, 350 F. Supp. at 1085; p. 1063 *supra*.

65. 395 U.S. 486 (1969).

66. *Id.* at 517.

the proper policy result. Until 1974, Congress established no way to police the frank.<sup>67</sup> The House Committee with jurisdiction over the privilege stated that no legislative forum was open to complaints.<sup>68</sup> Although the Post Office Department did offer advisory guidelines before 1968,<sup>69</sup> the use of the frank was left for at least six years solely to "the conscience of the individual member."<sup>70</sup> Because the incumbent's conscience might not adequately consider the public interest in fair elections, the courts should permit suits by someone who opposes the congressman, is directly harmed, and can assert the public interest.<sup>71</sup>

B. *Judicial Interpretation of the Old Statute: Classification of Mailings by the Congressman's Motive and by Interpretation of Legislative History*

Most courts recognized that the suits were not barred by the speech or debate clause or by political question doctrine.<sup>72</sup> Their decisions

67. SUBCOMM. ON POSTAL SERVICE OF THE HOUSE POST OFFICE AND CIVIL SERVICE COMM., 92D CONG., 1ST SESS., LAW AND REGULATIONS REGARDING USE OF THE CONGRESSIONAL FRANK 1-2 (Comm. Print No. 14, 1971) [hereinafter cited as FRANKING COMM. PRINT]. See also *Schiaffo v. Helstoski*, 350 F. Supp. at 1085-86, 1086 n.4.

68. FRANKING COMM. PRINT 2; *Senate Franking Hearings*, supra note 25, at 32.

69. FRANKING COMM. PRINT 5-6. For the guidelines themselves, see Post Office Dep't, Publication #126, The Congressional Franking Privilege, April 1968, at 1-9; 1962 Statement of the Post Office Department, published in Congressional Research Service, The Franking Privilege of Members of Congress, Dec. 27, 1972, at 85. For some of the advisory opinions on the frank, see 1-9 OF. ASST. ATT'Y GEN. P.O.D. (1873-1951).

Some courts in 1972 essentially enforced the Post Office guidelines, e.g., *Bowie v. Williams*, 351 F. Supp. at 631 n.6; *VanHecke v. Reuss*, 350 F. Supp. 21, 24, 25 (E.D. Wis. 1972). See 4 LOYOLA CHI. L.J. 513, 516 (1973).

However, the Post Office guidelines were never published as regulations of any sort. (The Postmaster General may have had power to do so. 39 U.S.C. § 3621 (1970); cf. Act of March 3, 1875, ch. 128, §§ 5, 7, 18 Stat. 343.) In practice, the Department enforced the guidelines only after citizen complaint. Interview with Postmaster General Arthur E. Summerfield in NEWSWEEK, June 22, 1953, at 27.

Even if the Department determined that the congressman had violated the guidelines, often the congressman would not pay the postage due. *Hoellen v. Annunzio*, 348 F. Supp. at 310; NEWSWEEK, June 22, 1953, at 26; NEW REPUBLIC, Jan. 3, 1970, at 9-10. Thus, the guidelines were ineffectual.

In 1968, under political pressure, the Department gave up even formulating guidelines. *Rising v. Brown*, 313 F. Supp. at 827 n.3; *House Franking Hearings*, supra note 19, at 96. See also H.R. 8924, H.R. 9102, H.R. 11156, 90th Cong., 1st Sess. (1967) (bills "to relieve the Postmaster General of responsibility for determining mailability under the congressional frank").

The Postal Service's position since 1968 has been that Congress should decide what can be franked and that the Service will deliver whatever a congressman mails. FRANKING COMM. PRINT, supra note 67, at 5. See also *Hearings on Transportation, Postal Service and General Appropriations for 1974 Before a Subcomm. of the House Appropriations Comm.*, 93d Cong., 1st Sess., pt. 2, at 62 (1973).

70. FRANKING COMM. PRINT 1-2.

71. See *Schiaffo v. Helstoski*, 350 F. Supp. at 1085. See generally *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

72. *Belardino v. Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972); *Levy v. Abzug*, 355 F. Supp. 1299 (S.D.N.Y. 1972); *VanHecke v. Reuss*, 350 F. Supp. 21 (E.D. Wis. 1972); *Hoellen v. Annunzio*, 348 F. Supp. 305 (N.D. Ill.), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973); *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970).

on the merits, however, failed to protect the public's interest in fair elections and thus showed the need for a new way to reconcile this interest with the need for representative-constituent communication.

The suits concerned two types of statutes. The first type permitted the congressman to frank certain specific kinds of material—reprints of the *Congressional Record*, agricultural publications, and public documents printed by order of Congress.<sup>73</sup> In regard to this type of statute, the challengers argued that it did not permit free mailings when the congressman was mailing to advance his own candidacy. Although the statute contained no explicit limit of any kind, the plaintiffs contended that the congressman made such mailings “in bad faith”<sup>74</sup> because they were irrelevant to his official duties as a representative or legislator.

All the courts,<sup>75</sup> with one possible exception,<sup>76</sup> answered this argument summarily: The statute did not limit mailings of material within the designated classes. Therefore, as long as the reprints were from the *Congressional Record* and the publications emanated from the Agriculture Department or were ordered to be printed by Congress, they were ipso facto frankable. Since congressmen may have almost anything printed in the *Congressional Record*,<sup>77</sup> the holding of the courts meant that any number of questionnaires, newsletters, press releases, and statements could be franked at any time into a congressional district.<sup>78</sup> Surprisingly, in view of the wide harm possible, the courts gave little justification for the holding besides the literal language of the statute. The only other substantial reason advanced to

73. See note 40 *supra*.

74. See p. 1063 *supra*.

75. See the summary of this line of cases in *Levy v. Abzug*, 355 F. Supp. at 1300. As to Judge Robert L. Carter's statements in *Levy* about *Rising v. Brown* see note 76 *infra*.

76. *Rising v. Brown*, 313 F. Supp. at 827. Judge David L. Williams says:

I do not believe that § 4163 [renumbered 39 U.S.C. § 3212 in 1970] can be interpreted as to eliminate all protection against abuse of the frank, else a congressman could cause undisputed campaign material to be inserted in the *Congressional Record* for the sole purpose of allowing him to disseminate it among the people of his district or state by use of the franking privilege.

The defendant congressman in *Rising* had inserted the material in the *Congressional Record* only after the court had issued a temporary restraining order. Therefore, the quoted statement has been called dicta, or considered only applicable to insertion of material in defiance of a court order not to frank it in the first place. See *Levy v. Abzug*, 355 F. Supp. at 1300; *Bowie v. Williams*, 351 F. Supp. at 633.

77. 96 CONG. REC. (App.) 5837 (1950); 54 CONG. REC. 1760 (1918); IN CONGRESS ASSEMBLED, *supra* note 17, at 280-81; M. GREEN, J. FALLOWS & D. ZWICK, *supra* note 17, at 237-38. But see note 55 *supra* for a rare exception.

78. The courts also held that reprints from the *Congressional Record* need not be exact duplicates of the original; their print could be enlarged and a cover letter with a picture of the representative on it could accompany the reprint. *Schiaffo v. Helstoski*, 350 F. Supp. at 1094; *Straus v. Gilbert*, 293 F. Supp. at 216.

support the holding was that to decide otherwise would allow the courts to "tell Congress what it can print in its Journal."<sup>79</sup>

This rationale does not justify ignoring completely the interests of challengers in seeking office and of the public in fair elections. The question is not what Congress can print but what congressmen can disseminate at public expense. Courts have long distinguished dissemination from original publication, imposing liability for defamation in the event of dissemination but not for the act of publication in the *Record*.<sup>80</sup> Where there is such harm to another interest, courts should continue to draw this line.

Having failed to achieve any equitable balance between the competing objectives in regard to mailings of these specific kinds of matter, the courts did little better in regard to the second type of statute, the general franking statute which authorized free mailings for "correspondence . . . upon official business."<sup>81</sup> Here the plaintiffs had a stronger literal argument. They contended that mailing of campaign matter was not "upon official business." However, they and the courts realized that the congressman, except in rare and minor cases, did not blatantly solicit votes or openly attack opponents. Thus unable to point to matter political on its face,<sup>82</sup> the challengers proposed that material neutral on its face was "a mask for personal motives."<sup>83</sup> To see beneath the mask, they called the courts' attention to the proximity of the mailing to election<sup>84</sup> and to the fact that it was addressed to voters.<sup>85</sup>

Faced with this logic the courts attempted to determine whether the congressman's motive for franking was to gain politically or to act officially. But there are no standards to separate what is political from what is official.<sup>86</sup> Almost anything a congressman does can be

79. *Straus v. Gilbert*, 293 F. Supp. at 216, followed in *Levy v. Abzug*, 355 F. Supp. at 1300, and *Bowie v. Williams*, 351 F. Supp. at 633.

80. See p. 1056 *supra*.

81. See note 39 *supra*.

82. *Rising v. Brown*, 313 F. Supp. at 826-28, holds that the mailing is political on its face. The Seventh Circuit in *Annunzio*, 468 F.2d at 526, concludes that the questionnaire at issue is "official" on its face; the dissent, *id.* at 527, says that the court should stop its inquiry there. (For a copy of Annunzio's questionnaire, see *House Franking Hearings*, *supra* note 19, at 26-29.) *VanHecke*, 350 F. Supp. at 24-25, finds the mailing official in content.

83. *Hoellen v. Annunzio*, 468 F.2d at 526.

84. *Rising v. Brown*, 313 F. Supp. at 826, says that it is "of critical importance" that the defendant waited until two weeks before election to mail. In *VanHecke v. Reuss*, 350 F. Supp. at 22-23, the court places some weight on the fact that the mass mailings in issue were made in July, August, and September.

85. See, e.g., *Belardino v. Murphy*, 364 F. Supp. at 1224; *Levy v. Abzug*, 355 F. Supp. at 1300.

86. *Annunzio v. Hoellen*, 468 F.2d at 528-29; *Bowie v. Williams*, 351 F. Supp. at 631; *VanHecke v. Reuss*, 350 F. Supp. at 25; cf. cases where the Supreme Court, in inter-



labeled political. Observers of American politics have long noted that House members run continuously for reelection.<sup>87</sup> In a more philosophical sense the highest goal of a representative perhaps should be reelection;<sup>88</sup> the purest legislative tasks—voting, conducting committee hearings, introducing bills—may be motivated solely by the desire for reelection and may contribute greatly to it.<sup>89</sup> By the same token a mailing may be politically motivated, yet serve legitimate interests of the political system such as keeping constituents informed or answering their grievances. To decide what may be franked as “official business,” courts cannot simply classify some mailings as political and others as official on the basis of a judicial abstraction of the congressman’s motive.

Forced to decide an issue impossible to decide by classification of motive, the courts in 1972 evolved a mechanical test in order to distinguish political from official mailings. Mailings were held not “upon official business” (and thus not frankable) only if directed to persons outside the district which the congressman represented. Thus mailings to a redistricted area which would vote on the congressman in November but which he could not represent until January were banned,<sup>90</sup> as were mailings all over a state where the congressman was a senatorial candidate.<sup>91</sup> As long as he mailed to the district which he then represented, the congressman could mail any quantity at any time. By adopting this mechanical test, the courts forbade the grossest use of the frank to benefit the incumbent but permitted all other mailings into the district without any limit.

Again, the courts failed to strike any balance between the opposing goals. The most politically effective mailing is continuous mailing over time to the same area.<sup>92</sup> The holding of the 1972 cases expressly

preting laws, refuses to consider the motive of the legislature in enacting the law, *e.g.*, *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 86, 130 (1800). This simple fact would vitiate a statute which simply prohibited any use of the congressional franking privilege for campaign purposes. See this proposal in Note, *supra* note 21, at 81-86.

87. S. BAILEY & H. SAMUEL, *CONGRESS AT WORK* 11 (1952); C.L. CLAPP, *supra* note 20, at 330; C. HAWVER, *THE CONGRESSMAN’S CONCEPTION OF HIS ROLE* 58 (1963) [hereinafter cited as *THE CONGRESSMAN’S ROLE*]; *THE PUBLIC TRUST*, *supra* note 26, at 15.

88. *Hoellen v. Annunzio*, 468 F.2d at 525-26. See Congressman Annunzio’s elaboration of the argument in *House Franking Hearings*, *supra* note 19, at 57.

89. 119 CONG. REC. H2613 (daily ed. Apr. 11, 1973) (remarks of Congressman Udall); see the analysis in the *Annunzio* dissent, 468 F.2d at 529. Because congressmen realize that almost everything they do can be called political, they complain that their opponents are using the courts only for campaign publicity. *House Franking Hearings* 30-31, 52; *Senate Franking Hearings*, *supra* note 25, at 34.

90. *Hoellen v. Annunzio*, 468 F.2d at 527; *Belardino v. Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972); *VanHecke v. Reuss*, 350 F. Supp. at 24.

91. *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970).

92. See notes 28-34 *supra*.

approves this practice within the congressional district represented by the incumbent. The plaintiffs and the courts in 1972 focused on motive and seldom explicitly recognized, let alone weighed, the competing interests.

One court, however, avoided the dead end of classification by motive and the mechanical test. *Schiaffo v. Helstoski*<sup>93</sup> determined the scope of the franking privilege statutes by Congress's original intent in enacting them, and thus forced Congress to enact new laws.

*Schiaffo* held that Representative Walter I. Hayes, the sponsor of the 1895 Act which first authorized the frank for "correspondence . . . upon official business," intended only one use of the frank—to forward letters or documents, received from the executive departments, on to constituents with a cover letter.<sup>94</sup> Thus, *Schiaffo* concludes that the legislative history restricts the franking privilege on official business to this specific use.

Congress considered this interpretation of legislative history to be correct and moved to adopt a new statute because of it.<sup>95</sup> Ironically, however, the great weight of historical material shows that *Schiaffo* is wrong in its interpretation of legislative history. The House debate it relies on was brief<sup>96</sup> and confused;<sup>97</sup> the Senate's summary of the

93. 350 F. Supp. 1076 (D.N.J. 1972).

94. *Id.* at 1090. The opinion accepts the view of the sponsor because

an inference can be drawn that the personal views of the member of Congress as to the meaning of a particular provision constitute the construction adopted by those who vote on the measure.

*Id.* at 1091-92. The statute in issue is Act of Jan. 12, 1895, ch. 23, § 85, 28 Stat. 622.

95. 118 CONG. REC. H9511 (daily ed. Oct. 11, 1972) (statement by House Majority Leader Hale Boggs). See also *House Franking Hearings*, *supra* note 19, at 92.

96. It occupies only parts of two pages of the *Congressional Record*. 25 CONG. REC. 2748-49 (1893), reprinted at 350 F. Supp. at 1098-1100.

97. First, few congressmen heard the sponsor's initial comments. 25 CONG. REC. 2748 (1893), reprinted at 350 F. Supp. at 1098 (Rep. Richardson). Yet *Schiaffo* relies primarily on the initial comments. 350 F. Supp. at 1089-90.

Second, Congressman McMillan, who discussed the amendment more than anyone else, stated that the amendment was creating a broad franking privilege. 25 CONG. REC. 2748-49 (1893), reprinted at 350 F. Supp. at 1098-99. But cf. 25 CONG. REC. 2749 (1893), reprinted at 350 F. Supp. at 1100 (McMillan-Hayes exchange).

Third, the House was confused over whether it had already an equivalent privilege. Hayes stated that, before his amendment, congressmen did have an equivalent privilege—the right to receive penalty envelopes from the departments and to enclose with them a cover letter when forwarding. As authority for this view he refers to "the ruling of the Assistant Attorney General in the case of the gentleman from Massachusetts." See 25 CONG. REC. 1651 (1893); 2 OP. ASST. ATT'Y GEN. P.O.D. 236 (1886).

Congressman McNagney answered, "He held just the other way." 25 CONG. REC. 2749 (1893), reprinted at 350 F. Supp. at 1100. McNagney was correctly referring to two Attorney General opinions which held clearly that a congressman could *not* enclose a cover letter with a response which he was forwarding from a department to a constituent. See 16 OP. ATT'Y GEN. 501 (1880); 17 OP. ATT'Y GEN. 264 (1882). Congressman Herman then asked two questions; the sponsor, Congressman Hayes, answered neither. 25 CONG. REC. 2749 (1893), reprinted at 350 F. Supp. at 1100. Thus, the House did not know whether, at the time it voted, it already had the privilege it was voting on.

Fourth, the discussion misstates the amount of the stationery allowance, stating that it was \$150. 25 CONG. REC. 2749, reprinted at 350 F. Supp. at 1099 (McMillan and

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House debate was ambiguous;<sup>98</sup> the next discussion of the section three years after enactment<sup>99</sup> failed to mention the sponsor's theory at all<sup>100</sup> and interpreted the privilege as covering "the business of the office."<sup>101</sup> Although the sponsor's views upon which *Schiaffo* relies wholly never surface again,<sup>102</sup> the history of the statute from 1895 to 1972 recognized that Congress enacted a general franking privilege in 1895.<sup>103</sup> Thus, the one limit *Schiaffo* finds—legislative history—turns out to be no limit at all.

Oates). In 1893, the allowance was \$125. See Act of Feb. 12, 1868, ch. 8, 15 Stat. 35; [1893-94] DEC. OF THE FIRST COMP. OF THE TREAS. 46.

This misstatement is significant because *Schiaffo* assumes that in 1895 "congressmen had been restricted to a \$150 [*sic*] stationery account." 350 F. Supp. at 1090. But the evidence is that in practice this amount—\$125—was more than could be spent for postage and stationery. See 58 CONG. REC. 3860 (1919); 41 CONG. REC. (APP.) 18-19 (1907); 13 CONG. REC. 1967, 2781, 2784, 2785 (1882). Therefore, even if the amendment was perfectly understood by all those voting to be only a very specific kind of privilege, the amount of free mail was just as unrestricted in fact in 1895 as in 1972.

98. [T]he last paragraph of this section [the official business privilege] extends somewhat the existing privilege with regard to official correspondence of Senators, Representatives, and Delegates.

S. REP. NO. 574, 53d Cong., 2d Sess. 48 (1894) (emphasis added). There was no comment on the Senate floor in regard to the establishment of the official business privilege. 26 CONG. REC. 7984-95 (1894).

99. 29 CONG. REC. 737-40, 763-65 (1897). The discussion was on a bill to impose a \$300 penalty for any unauthorized persons using the frank.

Congressman Richardson led this discussion in 1897. *Id.* He had amended Hayes' official business section four years before. 25 CONG. REC. 2748 (1893), reprinted at 350 F. Supp. at 1098. Note Richardson's statement that the official business section had not been "well prepared" or "well understood." 29 CONG. REC. 737 (1897).

*Schiaffo* does not mention this 1897 discussion. Neither the defendant congressman nor the House Administration Committee, in their briefs, called it to the court's attention. See the briefs at 118 CONG. REC. E8691, E8696 (daily ed. Oct. 14, 1972).

100. An amendment was proposed to extend the franking privilege to the non-elected officers of the House. 29 CONG. REC. 739 (1897). No one objected that these officers received little, if any, departmental mail to forward on to constituents. Rather, in analyzing the amendment, all congressmen compared the franking privilege with the lump-sum allowances which the officers then received for postage. *Id.* This shows that Congress interpreted the franking privilege as covering the "business of the office" and not just departmental mail.

101. Several congressmen called it "the franking privilege." 29 CONG. REC. 737 (Richardson), 739 (Lacey), 739 (Boutelle), 739 (Stone) (1897). Note the clear "general franking" definitions. *Id.* at 764 (Richardson and Boutelle).

102. There are only two references in *Schiaffo* which constitute reiterations of the sponsor's theory. See 350 F. Supp. at 1091. The first contains only two sentences and does not pretend to describe what the statute's scope was; it relates only to increasing the weight limit. 31 CONG. REC. 4604 (1898) (Sen. Cockrell).

The second reiteration which *Schiaffo* points to fails to mention departmental mail at all. 38 CONG. REC. 4299 (1904) (Sen. Lodge). On the contrary, Lodge calls the privilege the one for "general correspondence." This by itself might fulfill *Schiaffo's* search for a purely formal change in congressional intent. For another possible formal change, see Act of July 9, 1971, Pub. L. No. 92-51, § 525, 85 Stat. 132 (granting the Legislative Counsel of the House the right to send "the official mail matter of the Office as franked mail under section 3210 of title 39, United States Code"). This language of the statute could be accepted as reading an "official mail of the office" definition into the entire franking privilege. Thus, even purely formal changes are present in the history of the statute.

103. *Schiaffo* ignores most of the post-1895 history despite its claim to being based on history. In 1895, a bill was introduced "to repeal so much of the 1895 Act . . . as extends the franking privilege." H.R. 8655, 53d Cong., 3d Sess., 27 CONG. REC. 1275 (1895). For the 1897 discussion, see text accompanying notes 99-101 *supra*. Note Lodge's

Even if the opinion had read the legislative history accurately, classification by legislative history would not reconcile the competing interests. The clear legislative intent, as *Schiaffo* indicates, was to permit *Congressional Record* reprints, public documents, and agricultural publications to be franked anywhere in the country in any quantity.<sup>104</sup> In particular, because congressmen have complete control over what is printed in the *Congressional Record*,<sup>105</sup> this holding would permit mass mailings to continue, even if the official business statute were wholly suspended. As seen above,<sup>106</sup> classification of mailings by the motive of the congressman at least offers the possibility that *Record* reprints and other documents can be restricted; the legislative history, standing alone, clearly does not restrict the mailing of *Record* reprints at all.

*Schiaffo's* classification by legislative history fails to balance communication and competition. However, this final failure of statutory interpretation did bring Congress to enact a new statute governing the franking privilege.

## II. The New Statute: A Policy and Constitutional Failure

Worried by the suits brought in 1972 and by fears that one-half the members of the House would face suits in 1974,<sup>107</sup> Congress passed in 1973 an Act "to clarify the proper use of the franking privilege."<sup>108</sup>

The first half of the Act spells out what Congress considers to be frankable mail matter; it defines in effect the "correspondence . . . upon official business" phrase in the old law. The approved uses of the frank "include but are not limited to" mailings to any person or to any government official about public matters,<sup>109</sup> "the usual and

1904 statement discussed in note 102 *supra*. For subsequent statements, see 76 CONG. REC. 12113-14 (1933); 75 CONG. REC. 14916, 14918-19 (1932) (Lozier); 74 CONG. REC. 1571 (1931) (Blanton); 58 CONG. REC. 3860 (1921); 57 CONG. REC. (App.) 333 (1920); 53 CONG. REC. (App.) 1608, 13916-19 (1916); 51 CONG. REC. (App.) 973 (1914); and, see the discussion of the postal patron privilege in the early 1960's in note 230 *infra*.

104. See 350 F. Supp. at 1088. *Schiaffo* holds this way only with respect to public documents franked by authority of 39 U.S.C. § 3211 (1970). To be consistent, it would have to so hold when material is franked by authority of 39 U.S.C. § 3212 (1970) (*Congressional Record* reprints); cf. 350 F. Supp. at 1094-95. See generally § 3212's original form, Act of March 3, 1875, ch. 128, § 5, 18 Stat. 343.

105. See p. 1069 *supra*.

106. See pp. 1069-70 *supra*. See in particular the argument in note 76 *supra*.

107. *House Franking Hearings*, *supra* note 19, at 59; *Senate Franking Hearings*, *supra* note 25, at 26.

108. Act of December 18, 1973, Pub. L. No. 93-191, 87 Stat. 737 [hereinafter cited as Act].

109. Act, § 3210(a)(3)(A).

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customary congressional newsletter or press release,"<sup>110</sup> "the usual and customary congressional questionnaire,"<sup>111</sup> mail "expressing condolences to a person who has suffered a loss or congratulations to a person who has achieved some personal or public distinction,"<sup>112</sup> and any federal publications, "including general mass mailings thereof."<sup>113</sup> As Congressman Morris Udall, the leading congressional authority on the Act stated again and again, these approved uses were intended to be a summary of present practice.<sup>114</sup>

On the other hand, the specific unauthorized uses of the frank are defined narrowly—"purely personal" mailings,<sup>115</sup> mailings "laudatory and complimentary" about a member "on a purely personal or political basis rather than on the basis of performance of official duties,"<sup>116</sup> holiday greetings,<sup>117</sup> and mailings "which specifically solicit political support."<sup>118</sup> By the Act's language and by its reports<sup>119</sup> and hearings,<sup>120</sup> Congress meant to define the scope of the franking privilege broadly and in conformity with its past practice.

The second half of the Act sets up machinery to enforce the definitions of the first half. A Commission on Congressional Mailing Standards is established in the House<sup>121</sup> to hear complaints from any

110. *Id.* § 3210(a)(3)(B). For a discussion of congressional newsletters, see note 206 *infra*.

111. *Id.* § 3210(a)(3)(C). See the discussion of questionnaires at pp. 1089-90 *infra*.

112. *Id.* § 3210(a)(3)(F). For the present practice on letters of condolence and congratulation, see p. 1090 *infra*.

113. *Id.* § 3210(a)(3)(G). This section at least authorizes the mailing of indexes of agricultural and consumers information. See note 211 *infra*.

114. See, e.g., 119 CONG. REC. H2600 (daily ed. Apr. 11, 1973). Congressman Udall has since been named the first Chairman of the House Commission on Mailing Standards.

115. Act § 3210(a)(4). The impermissible uses listed in the text parallel the old Post Office Department guidelines. See note 69 *supra*.

Some congressmen worried that courts would construe these impermissible uses so as to reduce the scope of the permissible uses. *House Franking Hearings, supra* note 19, at 53-54. But see H.R. REP. NO. 88, 93d Cong., 1st Sess. 5 (1973); S. REP. NO. 461, 93d Cong., 1st Sess. 3 (1973).

116. Act § 3210(a)(5)(A).

117. *Id.* § 3210(a)(5)(B)(iii). More generally, § 3210(a)(5)(B)(i) declares impermissible "greetings from the spouse or other members of the family of such Member or Member-elect." In addition, § 3210(a)(5)(B)(ii) forbids:

reports of how or when such Member or member-elect, or the spouse or any other member of the family of such member or member-elect, spends time other than in the performance of, or in connection with, the legislative, representative, and other official functions of such Member or the activities of such Member-elect as a Member-elect.

118. Act § 3210(a)(5)(C).

119. H.R. REP. NO. 88, 93d Cong., 1st Sess. 1, 5 (1973); S. REP. NO. 461, 93d Cong., 1st Sess. 3-4 (1973).

120. The Chairman of the Congressional Operations Committee interpreted the opinions of the courts to be telling Congress to define its specific uses of the frank. *House Franking Hearings, supra* note 19, at 52.

121. Act § 5(a). For the rules and regulations governing proceedings before the Commission, see 120 CONG. REC. H919-22 (daily ed. Feb. 19, 1974).

The Senate gave the same general role to its already-existing Select Committee on Standards and Conduct, Act § 6, but with one overriding difference, see note 178 *infra*.

person about a "violation of any section [of the franking privilege statutes] of title 39."<sup>122</sup> Composed of three majority party and three minority party members,<sup>123</sup> the Commission will also render advisory opinions to, and consult with, any person entitled to frank mail.<sup>124</sup> Upon receiving a complaint, the Commission shall, "if it determines there is reasonable justification for the complaint," conduct an investigation.<sup>125</sup> Then, "if it determines that there is substantial reason to believe that such violation has occurred or is about to occur," the Commission shall hold a hearing.<sup>126</sup> Within 30 days after the hearing, the Commission shall issue a written decision; if no hearing is held, it must issue a written decision within 30 days of receiving the complaint. No civil suit "of any character" may be brought before any court or administrative body, "except judicial review of the decisions of the Commission." In any judicial review of the Commission's actions,<sup>127</sup> its findings of fact shall be "binding and conclusive"; such review shall be "limited to matters of law."<sup>128</sup> If the Commission finds that a "serious and willful violation has occurred or is about to occur," it "may refer such decision to the Committee on Standards of Official Conduct of the House of Representatives for appropriate action."<sup>129</sup>

#### A. *The New Statute's Substance: Policy Failures*

The first half of the Act which defines what may be franked fails on both policy and constitutional grounds. First, in terms of policy, it is an understatement to say that the Act does little to protect the

122. Act § 5(e). By allowing any person to make a complaint, Congress may have granted that person standing to appeal, even if he would not have had standing to sue before the Act. See generally G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW 106-08 (1970).

123. *Id.* § 5(b). For the membership of the Commission, see 120 CONG. REC. H247 (daily ed. Jan. 29, 1974).

124. Act § 5(d).

125. *Id.* § 5(e).

126. *Id.*

127. Judicial review of the Commission's actions is apparently by the district courts. The Act says that the Administrative Procedure Act "shall govern matters under this subsection subject to judicial review thereof." *Id.* This implies that judicial review of the Commission's decision can be had in the district court. See 5 U.S.C. § 703 (1970), and *Rettinger v. F.T.C.*, 392 F.2d 454 (2d Cir. 1968).

128. Congress did not indicate what it meant this standard of review to mean in practice. It is probably stricter than that of the Administrative Procedure Act. Compare 5 U.S.C. § 706 (1970), with Act § 5(e). The Act is on its face stricter than the normal standard for review of facts found by a trial court—"conclusive unless against the clear weight of the evidence or not supported by substantial evidence." J. MAGUIRE, J. WEINSTEIN, J. CHADBURN & J. MANSFIELD, EVIDENCE 77-78 (1973). For a discussion of what is "fact" and what is "law," see generally H. HART & A. SACKS, THE LEGAL PROCESS 369-85 (1965).

129. Act § 5(e).

challenger while at the same time expanding the scope of the privilege beyond what is necessary for legitimate mailings.

The Act authorizes the practice of continuous mass mailings in every form; no limit is imposed on the number of mailings or on their frequency over the two-year term. Letters to each set of parents of a new baby, to every high school graduate, to all newly-married couples, and to every family that experiences a death are expressly allowed. Questionnaires and newsletters, as often as the congressman wishes, are permitted in unlimited quantity. Mailing of indexes of agricultural and consumer publications are authorized. For the first time, mailgrams may be franked, again without quantity or frequency limits.<sup>130</sup> The frank has its political impact because it reaches voters over and over again; the Act puts no limit on this use.

That the Act tips the scale far too much in favor of communication is clear from the one significant restriction it places on the use of the frank<sup>131</sup>—a ban on mass mailings<sup>132</sup> for 28 days before any election in which the member is a candidate.<sup>133</sup> A limited cutoff of this kind is simply ineffectual: Many members do not frank mass mailings

130. *Id.* § 3219.

131. The specific uses which Congress declared impermissible do not constitute significant restrictions on the scope of the privilege. *See* p. 1075 *supra*. The 1972 cases showed that the uses which the Act declared impermissible are rare. Most congressmen do not blatantly solicit votes or openly attack opponents in their franked mail. *See* p. 1070 *supra*.

Congress wisely provided that reprints of the *Congressional Record* were not ipso facto frankable and had to meet the same standards as any other franked material. Act § 3212(b). This might seem a restriction on the use of the frank, when compared with most of the holdings in 1972 and with the conventional political wisdom. *See* p. 1069 *supra*. But the opinion of one court indicates that Congress's advertised restriction of changing the ipso facto rule is no change at all. *See* *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970), and note 76 *supra*.

132. Mass mailings are defined as:

newsletters and similar mailings of more than 500 pieces in which the content of the matter mailed is substantially identical but shall not apply to mailings—

(i) which are in direct response to inquiries or requests from the persons to whom the matter is mailed;

(ii) to colleagues in Congress or to government officials (whether Federal, State, or local); or,

(iii) of news releases to the communications media.

Act § 3210(a)(5)(D). For the Commission's regulations governing the mass mailings ban, see 120 CONG. REC. H1474-75 (daily ed. Mar. 5, 1974).

133. *Id.* The original House bill barred mailings with the simplified postal patron address for 60 days before any election. *House Franking Hearings*, *supra* note 19, at 8. As reported by the House committee and as passed by the House, the bill called for only a study of a ban of not over 30 days before any election. 119 CONG. REC. H2600-01 (daily ed. Apr. 11, 1973); H. REP. NO. 88, 93d Cong., 1st Sess. 12 (1973). The Senate added to the bill Senator Nunn's amendment (*see Senate Franking Hearings*, *supra* note 25, at 42) to restrict any mass mailing, with or without postal patron address, for 30 days before any election. 119 CONG. REC. S19033 (daily ed. Oct. 11, 1973). A similar amendment had failed on the House floor. 119 CONG. REC. H2614-17 (daily ed. Apr. 11, 1973). In conference, the Senate's amendment prevailed; see pp. 1092-93 *infra* for the reasons why.

within a month of election, anyway;<sup>134</sup> and, the cutoff does nothing about continuous mass mailings during the other 22 months. That the Act merely adopts a short ban on mass mailings before elections shows that it fails to satisfy the need for fair elections.

At the same time that it adopted this ineffectual restriction, Congress rejected a more important limit—a ban on postal patron mailings. In effect since 1924 by Postal Service regulations,<sup>135</sup> the postal patron privilege facilitates mass mailings by permitting representatives to frank to each person who receives mail within their districts by the simplified address of "Postal Patron—X Congressional District." By this privilege the representative is spared the cost of addressing<sup>136</sup> and assured of comprehensive coverage.<sup>137</sup>

The Act as adopted by the Senate would have banned all postal patron mailings and thus increased the cost and reduced the effectiveness of mass mailings.<sup>138</sup> This would have struck a blow—however minor—at continuous year-round mailings. However, the Act in its final form codifies the postal patron privilege and thus rejects even a slight limit on mass mailings.<sup>139</sup> Codification of this privilege, along with rejection of any limit, indicates again that the Act allows more than necessary communication and hinders effective competition in the political arena.

In addition to defining expansively the franking privilege, Congress went out of its way to overrule the limits which the courts had attempted to impose under the old statute. Obviously, by passing a new Act with its clear legislative history, Congress foreclosed *Schiaffo's* use of legislative history as a limit on the frank.<sup>140</sup>

Further, the Act expressly overrules the holding of the cases where

134. See, e.g., 119 CONG. REC. H2614 (daily ed. Apr. 11, 1973) (remarks of Representative Seiberling); *Senate Franking Hearings*, *supra* note 25, at 33.

135. 39 C.F.R. § 122.4(d)(2) (1973). See POST OFFICE DEP'T, POSTAL LAW AND REGULATIONS § 85 (1932); 39 C.F.R. § 6.10(f)(1) (1938).

136. See 119 CONG. REC. H2603 (daily ed. Apr. 11, 1973) (comments of Representative Smith that the Senate operation, which consists of mailing lists and addressing machines with no postal patron addressing allowed, is more expensive).

137. Without the postal patron privilege, a House member will always miss a few constituents who receive mail but are not on any mailing list. 106 CONG. REC. 3284 (1960) (Rep. Cannon).

138. The Senate version stated simply that "[f]ranked mail may not be mailed with a simplified form of address." 119 CONG. REC. S19033 (daily ed. Oct. 11, 1973). Senators have long thought that congressmen use the frank, and postal patron mailings in particular, in order to run for the Senate. *Senate Franking Hearings*, *supra* note 25, at 28; N.Y. Times, Oct. 17, 1972, at 28, col. 7. For more objective reasons as to why the Senate voted to ban postal patron mailings by House members, see S. REP. NO. 461, 93d Cong., 1st Sess. 6 (1973).

139. Act § 3210(d).

140. See pp. 1072-74 *supra*.



mailings were classified by motive.<sup>141</sup> It permits mailings to a new part of a district before redistricting is in effect.<sup>142</sup> A congressman may frank into an area which will vote on him in November, but which he cannot represent until the following January.

This authorization serves little legislative purpose and simply grants a campaign advantage to incumbents. If an area only votes on the congressman and will not be represented by him until three months after the election, his mass mailings to that area can only bolster him politically.<sup>143</sup> At the same time, these mailings do such harm to the challenger and his supporters that effective competition becomes more difficult, if not impossible. Therefore, Congress confers an electoral advantage on incumbents where the interest in legitimate communication is absent.

The only possible argument that mailings to newly-redistricted areas are legitimate communication is that the representative will soon serve the area and should begin to tell the constituents who their representative will be.<sup>144</sup> This argument assumes that the incumbent will be reelected and ignores the fact that the area must already be within another congressman's district. A broader argument—that a representative can frank mass mailings anywhere because he “really” represents the state or nation—is even weaker.<sup>145</sup> It leaves the frank completely without limits and gives no value to the need for fair elections. Congress itself rejected this broader argument by its specific authorization that franked mail may go to an area soon to be in the congressman's district.

The first half—the substantive sections—of the Act fails to strike a balance between the competing interests. It defines without limits the franking privilege, rejects a minor reform while adopting an ineffectual one, and overrules the restrictions which the courts had imposed in 1972. In these ways it if anything inhibits competition.

141. See p. 1071 *supra*.

142. A Member of the House may mail franked mail with a simplified form of address for delivery—

...  
(B) On and after the date on which the proposed redistricting of congressional districts in his State by legislative or judicial proceedings is *initially completed* (whether or not the redistricting is actually in effect), within any additional area of each congressional district *proposed* or established in such redistricting and containing all or part of the area constituting the congressional district from which he was elected, *unless and until the congressional district so proposed or established is changed by legislative or judicial proceedings.*

Act § 3210(d)(7) (emphasis added).

143. See the cases and the discussion at p. 1071 *supra*.

144. *House Franking Hearings*, *supra* note 19, at 45-46 (remarks of Congressman Clay).

145. See *id.*

B. *The New Statute's Substance: Constitutional Failures*

These policy failings are so serious that the first half of the Act may well invade constitutional rights of challengers, their supporters, and those who wish to vote for them. Two particular sections of the Act are open to characterization as unconstitutional—the section allowing mailings to a newly-redistricted area before redistricting takes effect,<sup>146</sup> and the section permitting mailings “to any person who has suffered a loss or who has achieved any public or personal distinction.”<sup>147</sup>

These two sections of the Act constitute unconstitutional advantages to incumbents at the expense of opponents. The state cannot grant the incumbent an advantage it denies to challengers; political candidates, whether in or out of office, must be treated even-handedly by the law. Federal courts have held that an incumbent's use of state-paid patronage workers on election day denies challengers equal protection of the laws.<sup>148</sup> Similarly, whether by law<sup>149</sup> or by practice,<sup>150</sup> incumbents may not receive favored ballot positions; laws which require excessive periods of residence also discriminate against potential challengers and are unconstitutional.<sup>151</sup> State subsidization of one candidate's mailings to each family with a death, to people who are not constituents but are voters, to every high school graduate, to every newly-married couple, and to each pair of new parents violates due process rights of candidates to a neutral set of laws affecting elections.<sup>152</sup>

146. Act § 3210(d)(1)(B).

147. Act § 3210(a)(3)(F).

148. *Shakman v. Democratic Organization*, 435 F.2d 267 (7th Cir. 1970). The Seventh Circuit acknowledged explicitly that it was declaring unconstitutional an electoral practice as opposed to an electoral law governing the mechanics of an election. *Id.* at 270.

See also *White v. Snear*, 313 F. Supp. 1100 (E.D. Pa. 1970), where the court held unconstitutional one faction's use of state-paid workers in a congressional primary election. The court spoke in terms of “equal treatment” for both factions. *Id.* at 1104.

149. For a scholarly discussion of the ballot position cases all over the country, see Justice Braucher's opinion in *Tsongas v. Secretary of Commw.*, 291 N.E.2d 149 (Sup. Jud. Ct. Mass. 1972). See also *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972); *Matter of Holtzman v. Power*, 62 Misc. 2d 1020, 313 N.Y.S.2d 904 (Sup. Ct.), *aff'd*, 34 App. Div. 2d 917, 311 N.Y.S.2d 824, *aff'd*, 27 N.Y.2d 628, 261 N.E.2d 666, 313 N.Y.S.2d 760 (1970).

150. *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969); *Mann v. Powell*, 314 F. Supp. 677 (N.D. Ill.), *aff'd*, 398 U.S. 955 (1970); cf. *Smith v. Paris*, 257 F. Supp. 901 (M.D. Ala. 1966), *modified on other grounds*, 386 F.2d 979 (5th Cir. 1967).

151. *Zeilenga v. Nelson*, 4 Cal. 3d 716, 723, 484 P.2d 578, 582, 94 Cal. Rptr. 602, 606 (1971). See generally Note, *Durational Residence Requirements for State and Local Office: A Violation of Equal Protection?*, 45 S. CAL. L. REV. 996 (1972); cf. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

An initial attempt to extend these constitutional attacks to age requirements for candidates failed. *Manson v. Edwards*, 345 F. Supp. 719 (E.D. Mich. 1972), *rev'd*, 482 F.2d 1076 (6th Cir. 1973).

152. The Fifth Amendment's due process clause protects candidates from discriminatory federal laws just as much as the Fourteenth Amendment's equal protection clause

The larger issue is whether the Act's delimitation of the scope of the franking privilege is unconstitutional apart from these two specific provisions.<sup>153</sup> On due process grounds the rest of the definition is probably constitutional. While society may have a limited interest in maintaining high filing fees,<sup>154</sup> keeping minor parties off the ballot,<sup>155</sup> permitting one faction to use patronage,<sup>156</sup> granting an incumbent the top line of the ballot,<sup>157</sup> or permitting representatives to frank letters of condolence and congratulation and into newly-redistricted areas,<sup>158</sup> the interest in representative-constituent communication is great, if not compelling. The Act's expansive definition of the scope of the franking privilege thus withstands a gross substantive due process test.

A particular congressman's use of the frank, however, may be unconstitutional even though the Act, except for two sections, is justified on its face. An incumbent may, by his use of the frank, infringe the right to vote.<sup>159</sup> Although, in any campaign, small groups of activists cluster around each candidate, the vast majority of the voters remain neutral, uninvolved, and relatively uninformed.<sup>160</sup> The franking privilege permits one candidate, the congressman, to sway neutral and uninformed voters at state expense. Votes of the congressman's backers are thus enhanced, whereas votes of the opponent's supporters are diluted.<sup>161</sup> If an opponent dares not run because of the congress-

protects them from discriminatory state laws and practices. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). See generally *Anticau, Equal Protection Outside the Clause*, 40 CAL. L. REV. 362 (1952).

153. The Act contains a severability clause, § 15, so that constitutional defectiveness of one part of the Act may not result in constitutional defectiveness of the entire Act.

154. *Bullock v. Carter*, 405 U.S. 134 (1972).

155. See *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

156. The Seventh Circuit's recent ruling that a patronage worker cannot be fired solely because of political party membership, once another party takes office, represents a judgment that the patronage system has little value. *State Employees Local 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972). See generally Note, *Political Patronage and Unconstitutional Conditions: A Last Hurrah for the Party Faithful*, 14 WM. & MARY L. REV. 720 (1973). For possible justifications of patronage, see 84 HARV. L. REV. 1547 (1971).

157. It is sometimes argued that this tells voters who the incumbent is. But the fact that there are often races without incumbents weakens this argument. See the discussion in *Tsongas v. Secretary of Commw.*, 291 N.E.2d at 152.

158. See notes 143-45 *supra* & notes 217-18 *infra*.

159. See the Supreme Court's summary of its cases protecting the right to vote, *Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972). See generally R. CLAUDE, *THE SUPREME COURT AND THE ELECTORAL PROCESS* (1970); Kirby, *The Constitutional Right to Vote*, 45 N.Y.U. L. REV. 995 (1970).

160. A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* 90-93 (1960) [hereinafter cited as A. CAMPBELL].

161. This parallels the logic of the reapportionment cases. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). For an eloquent statement of this proposition, see *Fortson v. Morris*, 385 U.S. 231, 246-50 (1966) (Fortas, J., dissenting);

man's continuous and excessive use of the frank, the votes of those out of power are totally ineffective.

Any congressman's use of the frank under the Act could be excessive enough to abridge the right to vote: In 1972, the Supreme Court recognized that a \$1,000 filing fee to run for county office "denies some voters the opportunity to vote for a candidate of their choosing."<sup>162</sup> Finding that the filing fee constituted enough of a barrier to candidacy that its effect on the right to vote was not "incidental or remote," the Court held that it denied candidates and voters equal protection of the laws.<sup>163</sup> Thus, just as filing fees—normally constitutional without question—can burden the right to vote if excessive, so one congressman's use of the frank—constitutional on its face—could burden the right to vote.

By the same logic, an incumbent's use of the free mailing right may violate the First Amendment right of the opponent and his supporters to freedom of association. In *Williams v. Rhodes*,<sup>164</sup> the Supreme Court invoked both the right to vote and the right to associate when it invalidated certain Ohio election laws. The laws required a party, other than the Democratic or Republican party, to obtain petitions signed by qualified electors totaling 15 percent of the votes cast at the preceding gubernatorial election, in order to place its presidential candidates on the ballot. The Court's opinion makes clear that laws cannot benefit one group of voters and harm another, that they must attempt neutrality between them.<sup>165</sup> The franking privilege

cf. A. ROSENTHAL, *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 24 (1972):

[I]f the Constitution requires that each man's vote count equally, may not that fact be deemed pertinent in consideration of the validity of measures intended to reduce inequalities in men's opportunities to affect the vote.

162. *Bullock v. Carter*, 405 U.S. 134, 143 (1972). The Court defined the connection between voting and candidacy:

[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.

*Id.* at 143. Compare *id.* with *Snowden v. Hughes*, 321 U.S. 1, 6-8, 13 (1944). See also *Zeilenga v. Nelson*, 4 Cal. 3d 716, 723, 484 P.2d 578, 582, 94 Cal. Rptr. 602, 606 (1971).

163. *Bullock v. Carter*, 405 U.S. at 144.

164. 393 U.S. 23 (1968).

165. The Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. . . . Competition . . . is at the core of our electoral process and of the First Amendment freedoms.

*Id.* at 31-32. In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court upheld a Georgia law requiring a minor party candidate to secure petitions signed by registered voters totaling five percent of the votes cast at the last general election for that office. However the Court emphasized that, in comparison with the Ohio laws in question in *Williams v. Rhodes*, the minor party candidates were not especially disfavored. A major party candidate had to win a primary election to gain a place on the general election ballot. 403 U.S. at 441-42.

gives a congressman the power to hinder association for political causes—either to defeat him or to boost an alternative. In a particular case his use of his frank could in no way be justified by the interest in communication between representative and constituent. Such an excessive use of the frank would unconstitutionally infringe the First Amendment right of free association of his opponent and his opponent's supporters.<sup>166</sup>

### C. *The New Statute's Enforcement Machinery: Policy and Constitutional Failures*

The second half of the Act establishes the House Commission on Congressional Mailing Standards.<sup>167</sup> As detailed above,<sup>168</sup> the Commission will render advisory opinions to anyone entitled to frank mail and will have exclusive jurisdiction of any complaint about abuse of the franking privilege. It will, if it finds that the complaint is reasonably justified, issue a written decision, which, like any other action of the Commission, is then subject to judicial review. If it finds a "serious and willful violation," the Commission "may refer its decisions to the House Committee on Standards of Official Conduct." This machinery of the second half of the Act fails on policy and constitutional grounds as much as does the substance of the first half.

The policy shortcomings are clear. Despite congressional statements that the Commission will be fair to both opponents and incumbents,<sup>169</sup> the Commission, being composed of six representatives, will probably interpret the definition of the franking privilege just as broadly as the Act delimits it.<sup>170</sup> The Commission will not render advisory opinions to challengers but will to incumbents, the rationale being that the incumbent deserves the advisory opinion in order to avoid loss of staff time and printing costs involved in a mailing not frankable.<sup>171</sup>

166. Even though a law or a practice sanctioned by law is justified by a compelling state interest, the means employed to effectuate the interest must be precise if the law or the practice burdens the fundamental right to associate. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966); *Aptheker v. Secretary of State*, 378 U.S. 500, 512 (1964); *N.A.A.C.P. v. Burton*, 371 U.S. 415, 430 (1963). The state must show that no less drastic means is available to meet the compelling state interest. *United States v. Robel*, 389 U.S. 258, 265 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

167. Act § 5.

168. See pp. 1075-76 *supra*.

169. See *House Franking Hearings*, *supra* note 19, at 93-94.

170. See 31 CONG. Q.W. REP. 1026 (1973) (statement of Jack Conway, President of Common Cause).

171. *Senate Franking Hearings*, *supra* note 25, at 25. During the Commission's first month of operation, 50 House members asked its staff for advisory opinions. *Wall St. J.*, Mar. 22, 1974, at 1, col. 6.

But the challenger, being harmed by the use of the frank, should also be able to receive an advisory opinion.

In addition, anyone who files a complaint will have to do so in Washington, D.C.<sup>172</sup> Although the Commission is authorized to hold hearings anywhere in the country,<sup>173</sup> hearings will be held there as well, unless the six members of the Commission, each with other legislative responsibilities, intend to hold hearings in every place where complaints arise each year. Thus the forum is convenient for the congressman but not for the complainant.<sup>174</sup>

Finally, the Commission is to receive no staff or office allowance beyond what it borrows from the House Post Office and Civil Service Committee.<sup>175</sup> This indicates not only that the Commission may not be able to do its work but also that the House may not have intended it to.

Policy failures aside, there is the constitutional issue of Congress's power to establish a body of this type. Congress can claim authority from its constitutional power to punish its members for disorderly behavior.<sup>176</sup> The Act does provide that the Commission may refer its decision to the House Committee on Standards of Official Conduct. Therefore, even though Congressman Udall, the sponsor of the Act, stated that the Commission would make no recommendation upon referral to the Committee,<sup>177</sup> the House may assert that the Commission is an auxiliary of its ethics committee.

The Act, however, does more than provide a procedure to punish members. It expressly makes the Commission the exclusive forum with original jurisdiction over any complaint about the franking privilege.<sup>178</sup> Thus, complaints which would have been brought in the

172. See Act § 5(e). See Rules 4 & 5, Rules of Practice in Proceedings Before the House Commission on Congressional Mailing Standards, 120 CONG. REC. H920 (daily ed. Feb. 19, 1974).

173. Act § 5(f).

174. This, without more, probably does not rise to a constitutional defect. See *South Carolina v. Katzenbach*, 383 U.S. 301, 331-32 (1966); cf. *Noyd v. Bond*, 395 U.S. 683, 696-98 (1969). But see Rules 13 & 14, Rules of Practice in Proceedings Before the House Commission on Congressional Mailing Standards, 120 CONG. REC. H920 (daily ed. Feb. 19, 1974).

175. Act § 5(e). For a listing of the staff of the House Post Office and Civil Service Committee, see 120 CONG. REC. H830-31 (daily ed. Feb. 13, 1974).

176. U.S. CONST. art. I, § 5, cl. 2.

177. 119 CONG. REC. H2603 (daily ed. Apr. 11, 1973) (remarks of Congressman Udall); *Senate Franking Hearings*, *supra* note 25, at 31.

178. Notwithstanding any other provision of law, no court or administrative body in the United States or in any territory thereof shall have jurisdiction to entertain any civil action of any character concerning or relating to a violation of the franking laws or an abuse of the franking privilege . . . except judicial review of the decisions of the Commission under this subsection.  
Act § 5(e). Significantly, the Senate bars review by any court or administrative body

district courts in 1972 will have to be brought before the Commission after 1973; they cannot be brought in state courts<sup>179</sup> or before any administrative body. Jurisdiction in the federal courts is limited to judicial review of the Commission's decisions.

This enforcement scheme raises serious constitutional questions. The Constitution postulates a judicial function distinct from the legislative.<sup>180</sup> Congress cannot direct how courts shall decide a case<sup>181</sup> nor can it subject their judgments to legislative revision.<sup>182</sup> Under the Act, a Commission of Congress is exercising a judicial power over "cases . . . arising under . . . the laws of the United States"<sup>183</sup> when it decides cases arising under the laws governing the franking privilege. The statutory direction to six members of the House of Representatives to make "binding and conclusive findings of fact" constitutes a legislative assumption of judicial power allocated by the Constitution to the judicial branch.<sup>184</sup> By trenching on the judicial function, the Commission itself may be unconstitutional.

Congress, however, may assert that the Commission is a necessary and proper means of exercising its Article I power to punish members for disorderly behavior.<sup>185</sup> Courts have long recognized Congress's power to establish "legislative courts."<sup>186</sup> These tribunals differ from Article III courts in three important respects: Judges on legislative courts need not have life tenure or protection from salary decreases; legislative courts may be required to perform administrative, advisory, or legislative functions and thus are not restricted to cases or controversies; and, legislative courts are established only to execute Congress's constitutional powers.<sup>187</sup> Thus, to execute its power to "make all needful Rules and Regulations respecting the Territory . . . belonging to

only "until a complaint has been filed with the select committee and the committee has rendered a decision." Act § 6(c).

The Senate version of the bill made this the standard for the House. 119 CONG. REC. S19034 (daily ed. Oct. 11, 1973). But the House refused to agree and won its own standards of exclusive jurisdiction with only judicial review possible. H.R. REP. NO. 712, 93d Cong., 1st Sess. 9-10 (1973).

179. Congress apparently meant to ban suits about the franking privilege from state courts. See note 178 *supra*. The Supreme Court has held that Congress can prohibit state courts from hearing any case on the validity of federal regulations. *Bowles v. Williams*, 321 U.S. 503 (1944).

180. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-91 (1949).

181. *Pope v. United States*, 323 U.S. 1 (1944); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

182. *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

183. U.S. CONST. art. III, § 2.

184. *Id.* art. III, § 1.

185. *Id.* art. I, § 5, cl. 2.

186. 1 MOORE'S FEDERAL PRACTICE ¶ 0.4(3), at 63-66 (1974). See *Palmore v. United States*, 411 U.S. 389 (1973); *Ex parte Bakelite*, 273 U.S. 438, 449 (1929).

187. 1 MOORE'S FEDERAL PRACTICE ¶ 0.4(1), at 53-60 (1974).

the United States,"<sup>188</sup> Congress established territorial courts throughout history in each new territory.<sup>189</sup> Drawing on this precedent and on that of several other legislative courts,<sup>190</sup> Congress may claim that the Commission is not performing a judicial function in violation of Article III, but that it is a legislative court necessary to the effective exercise of Congress's power to govern its members.

However, there is one significant distinction between past legislative courts and the Commission: The judges of the former legislative courts were appointed by the President with the advice and consent of the Senate.<sup>191</sup> Because the Constitution forbids congressmen to hold any office under the United States while serving in Congress,<sup>192</sup> representatives could never be judges of past legislative courts. Yet the Commission, considered as a legislative court, is composed of six congressmen as judges. The constitutional prohibition that no congressman may hold civil office forbids precisely this situation.

Even if the Commission were not a legislative usurpation of a judicial function, it fails to meet the requirements of due process. Any court, tribunal, or agency proceeding which affects legal rights of individuals must satisfy the basic requirements of due process.<sup>193</sup> Congress itself recognized that the Commission must meet these basic standards; it provided that "regulations for the holding of investigations

188. U.S. CONST. art. IV, § 3, cl. 2.

189. 1 MOORE'S FEDERAL PRACTICE ¶ 0.3(3.-1), at 22-28 (1974).

190. All of these courts are discussed fully in *id.* ¶¶ 0.3(3)-(5), (7)-(8), at 22-44, 47-50. The Court of Claims and the Court of Customs and Patent Appeals are now Article III courts. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (overruling *Ex parte Bakelite*, 279 U.S. 438 (1929), which held the Court of Claims an Article I tribunal, and *Williams v. United States*, 289 U.S. 553 (1933), which held the Court of Customs and Patent Appeals an Article I tribunal). Two legislative courts are presently operating: The Court of Military Appeals (see 10 U.S.C. § 867 (1970); Walker & Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228 (1953); and, the United States Tax Court (see 26 U.S.C. § 7441 (1970), and the summary of the cases, statutes, and articles in B. BITTKER & L. STONE, *FEDERAL INCOME ESTATE AND GIFT TAXATION* 941 (1972)).

191. See, e.g., 10 U.S.C. § 867 (1970) (judges of the Court of Military Appeals); 26 U.S.C. § 7443 (1970) (judges of the United States Tax Court). For the no longer existing legislative courts, see the sources in note 190 *supra*.

192. [N]o person holding any office under the United States shall be a member of either House during his continuance in office. U.S. CONST. art. I, § 6, cl. 2. See *Reservists Comm. To Stop War v. Laird*, 323 F. Supp. 833 (D.D.C. 1972) (no member of Congress may hold a commission in the armed forces reserve during his continuance in office).

In addition to the line of reasoning from the section of clause 2 stated above, it can be argued that no representative who served in the First Session of the 93d Congress (which created the Commission) may serve on it because of the first phrase of art. I, § 6, cl. 2:

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created . . . during such time.

193. *Hannah v. Larche*, 363 U.S. 420, 442 (1960). See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 87-120 (1965).



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and hearings, the conduct of proceedings, and the rendering of decisions" shall conform as nearly as practicable to the Administrative Procedure Act.<sup>194</sup>

One of the minimal requirements of procedural due process is an impartial judge. The Supreme Court has consistently held that a person's right to due process of laws is violated if "the judge . . . has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."<sup>195</sup> The Court delineated one aspect of this standard in *Ward v. City of Monroeville*.<sup>196</sup> The mayor of Monroeville, Ohio, was also the judge of the local traffic court. He received no percentage of any fine imposed and the defendant could request a trial de novo on appeal. The Court held that the mayor's interest as chief financial officer of the village, which received half its revenue from such fines, fees, and costs, disqualified him as a neutral and detached judge.

The Commission does not meet the due process requirement of an impartial judge. All six of the Commission's members are congressmen and thus potential defendants. It is possible for the Commission's docket to consist of six cases against its six members.<sup>197</sup> There no doubt would be a "direct, personal, substantial, pecuniary interest" in reaching a conclusion against the complainant.

In a broader sense any member of the Commission is partial when any other congressman is the defendant.<sup>198</sup> As a Commission member,

194. Act § 5(e). See the regulations in 120 CONG. REC. H919-22 (daily ed. Feb. 19, 1974). By its terms the Administrative Procedure Act does not apply to Congress. 5 U.S.C. § 701(b)(1)(A) (1970). See generally 5 U.S.C. §§ 551-59, 701-06 (1970).

195. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). For the requirement of an impartial trier in an administrative setting, see, e.g., *Amos Treat & Co. v. S.E.C.*, 306 F.2d 260 (D.C. Cir. 1962); *Berkshire Employees Ass'n v. N.L.R.B.*, 121 F.2d 235, 238-39 (3d Cir. 1941).

196. 409 U.S. 571 (1972). See also *Gibson v. Berryhill*, 411 U.S. 564 (1973). (Alabama Board of Optometry, composed solely of self-employed optometrists, held incompetent as biased to prohibit employed persons from being optometrists; the Board would inherit the business formerly done by employed optometrists and thus had "preconceived opinions" as to the outcome.)

197. The Act does allow four members of the Commission "to constitute a quorum to do business." § 5(b). Thus the members of the Commission could, faced with a docket consisting of six cases against its six members, each in turn not sit on the case where he is the defendant. However, one needs to know little about legislative log-rolling or congressional camaraderie in order to see that such a system leaves the Commission just as partial. Note the statement in *Berkshire Employees Ass'n v. N.L.R.B.*, 121 F.2d 235, 238-39 (3d Cir. 1941), in the context of multi-member tribunals:

The Board argues that at worst the evidence shows that only one of the body making the adjudication was not in a position to judge impartially. We deem this insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty, and there is no way we can know of whereby the influence of one upon the others can be measured.

198. Cf. *United States v. Brewster*, 408 U.S. 501, 519-20 (1972) (doubts expressed about the possibility of a congressional disciplinary committee meeting the standards of due process in what would normally be a criminal trial).

a congressman will be making precedent which will affect his own use of a valuable official and campaign prop which helps him retain his \$42,500 per year job.<sup>199</sup> Each member of the Commission will have a "direct, personal, substantial, pecuniary" stake in any case before the tribunal.

Despite congressional statements that the Commission would be impartial,<sup>200</sup> a Commission member, especially if he is the defendant and even if he is not, will be partial in the case before him. Significantly, when the Supreme Court first held that due process required an impartial trier, it noted:

The requirement of due process of law is not satisfied by the argument that men of the highest honor . . . could carry on judicial procedure without danger of injustice.<sup>201</sup>

Therefore, that part of the Act which creates the Commission is not a constitutional exercise of Congress's power to discipline its members.

### III. Possible New Statutes: Four Traditional Proposals

Discussion in the last 80 years during the life of the old statute suggests four solutions which Congress might adopt in order to reconcile the competing interests. Before any consideration is given to any other solution, these four need to be analyzed.<sup>202</sup>

199. 2 U.S.C. § 31 (1970).

200. See *House Franking Hearings*, *supra* note 19, at 93-94.

201. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

202. In addition to these four solutions, another Note has examined and rejected on policy grounds criminal sanctions for "abuse" of the franking privilege. Note, *supra* note 21, at 79-81. However, the Note assumes that it is already a crime to "abuse" the frank by the terms of 18 U.S.C. § 1719 (1970):

*Franking Privilege*

Whoever makes use of any official envelope, label, or indorsement authorized by law, to avoid the payment of postage or registry fee on his private letter, packet, package, or other matter in the mail, shall be fined not more than \$300.

This assumption is incorrect; 18 U.S.C. § 1719 (1970) does not apply to the congressional franking privilege. When this criminal statute was enacted, it was only to apply to executive branch penalty, not to congressional franked, mail. Act of March 3, 1877, ch. 103, § 5, 19 Stat. 335; see note 22 *supra* for a discussion of executive branch penalty mail. The \$300 criminal penalty is the penalty which must be printed on the envelope of all penalty mail. 39 U.S.C. § 3206 (1970).

To make clear that the criminal statute applied only to the executive branch, and not to members of Congress, Congress amended the penalty mail act to say just that. Act of July 5, 1884, ch. 234, § 3, 23 Stat. 158. Subsequent congressional discussions show that Congress realized that the criminal statute did not apply to its members. S. REP. NO. 10, 60th Cong., 2d Sess. 23 (1909); H.R. REP. NO. 2405, 59th Cong., 1st Sess. 5 (1906); 40 CONG. REC. 4751-54 (1906).

Only an accident of codification makes 18 U.S.C. § 1719 (1970), appear to apply to Congress. The 1925 codification of the laws left the exemption of congressmen in the substantive section authorizing the use of penalty mail. Act of June 30, 1926, tit. 39,

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One of the 1972 decisions<sup>203</sup> suggests the first standard proposal—a ban on unsolicited franked mailings. Complaints by challengers invariably center on mass, unsolicited mailings of press releases, newsletters, indexes of publications, questionnaires, and letters of condolence and congratulation.<sup>204</sup>

Although initially appealing and incidentally pointing the way toward the proper sort of solution, a ban on unsolicited mailings overshoots the mark, as some unsolicited mailings are necessary. For example, press releases, undoubtedly necessary to communication between representative and constituent, cannot be solicited.<sup>205</sup> As for newsletters,<sup>206</sup> neutral observers have judged them the highest quality discussion of political issues reaching the public.<sup>207</sup> If it is true that television fails to focus on congressional district-level news,<sup>208</sup> newsletters may also serve a truly public function.<sup>209</sup>

Mailings of questionnaires<sup>210</sup> and indexes of publications<sup>211</sup> are popular with constituents,<sup>212</sup> as indicated by responses to each.<sup>213</sup> To deny a congressman the ability to poll his constituents seems incon-

ch. 8, 44 Stat. 1256. But it removed the penalty to title 18, without including the exemption of congressmen in title 18. Act of March 4, 1909, ch. 321, § 227, 35 Stat. 1134; Act of June 30, 1926, tit. 18, § 357, 44 Stat. pt. 1, at 490. Congress explicitly stated that the codification was to change no law. Act of June 30, 1926, ch. 712, § 2(a), 44 Stat. pt. 1, at 1. Therefore, no criminal statute makes "abuse" of the franking privilege a crime.

203. *Schiaffo v. Helstoski*, 350 F. Supp. 1076 (D.N.J. 1972).

204. See the complaints in the cases listed in note 35 *supra*.

205. To restrict congressional press releases, while allowing executive releases to continue wholly at government expense, risks another imbalance. *House Franking Hearings*, *supra* note 19, at 98. Congressmen, unlike the Executive, must pay for their printing, whether by a subsidized service, see p. 1059 *supra*, by the purchase of *Congressional Record* reprints, see IN CONGRESS ASSEMBLED, *supra* note 17, at 13, or otherwise.

206. The practice of sending regular newsletters dates back to 1920. 57 CONG. REC. (App.) 334 (1919). In 1963, 231 of 437 House members sent newsletters. THE CONGRESSMAN'S ROLE, *supra* note 87, at 56. In 1967, 80 percent of another sample did. J. SALOMA, *supra* note 10, at 175. In 1968, 121 of 158 in a sample did. N.Y. Times, Oct. 18, 1968, at 35, col. 1. In 1970, TACHERON & UDALL, *supra* note 9, at 115, reported that practically all members sent newsletters of one sort.

As for volume, see J. SALOMA 175. As for frequency, note *Bowie v. Williams*, 351 F. Supp. 628, 630 (E.D. Pa. 1972). The Internal Revenue Service has ruled that a congressman may deduct as an ordinary and necessary expense of his business the cost of printing and mailing a newsletter. I.T. 4095, 1952-2 CUM. BULL. 90.

207. *House Franking Hearings*, *supra* note 19, at 63 (statement by representative of the Fair Campaign Practices Committee).

208. See note 32 *supra*.

209. THE PUBLIC TRUST, *supra* note 26, at 11.

210. In 1953, 11 percent of all congressmen used questionnaires; in 1961, 25 percent did. THE CONGRESSMAN'S ROLE, *supra* note 87, at 104.

211. These list publications available and often permit the constituent to receive a limited number free. See the discussion of the two types—consumers and agricultural—in *VanHecke v. Reuss*, 350 F. Supp. 21, 22 (E.D. Wis. 1972).

212. *House Franking Hearings*, *supra* note 19, at 60, 87; BOTH YOUR HOUSES, *supra* note 17, at 192; THE CONGRESSMAN'S ROLE 49-50.

213. *House Franking Hearings* 36; J. SALOMA, *supra* note 10, at 175 (average response was 16.7 percent); THE CONGRESSMAN'S ROLE 207-11.

sistent with the political theory underlying our government.<sup>214</sup> Even if studies find that the motives for such mailings are "political,"<sup>215</sup> the congressman's polling may yet serve legitimate functions.<sup>216</sup>

Mass mailings of letters of condolence and congratulation by contrast are indefensible. Many congressmen make mass mailings to every high school graduate, every set of newly-weds, each pair of new parents, and all families with deaths.<sup>217</sup> There is no legitimate state interest in subsidizing such communication when damage to a fair electoral process is the cost and these mailings under the frank should be prohibited.<sup>218</sup>

However, in the cases of the other types of mass unsolicited mailings—press releases, newsletters, questionnaires, indexes of publications—a complete ban would be inappropriate as each can be justified to some extent. In addition to the specific justifications outlined above, there is a larger justification—that a continuous stream of mail encourages people to write their congressmen whenever they wish to express an opinion or need assistance with a personal problem concerning the federal government.<sup>219</sup> But we have seen that this same stream of mail helps the incumbent because it at least brings his name—his biggest asset<sup>220</sup>—continuously before voters. Because of this basic conflict, a complete ban on unsolicited mailings sacrifices too much communication for the sake of competition. Yet some less drastic limit on the steady stream is needed.

A second traditional solution is to ban mass mailings for some period before any election. There is evidence that franked mail increases as election time draws near<sup>221</sup> and that any franked mailing near the

214. THE CONGRESSMAN'S ROLE 171.

215. *Id.* at 174-75, 184-88, 192-93, 228; J. SALOMA 176-77.

216. *See* pp. 1070-71 *supra*.

217. IN CONGRESS ASSEMBLED, *supra* note 17, at 60, 110; BOTH YOUR HOUSES, *supra* note 17, at 191. One study reports that congressional staffs spend four percent of their time on letters of condolence and congratulation. J. SALOMA 185. *See* the summary of the complaint in *Lamkin v. Shipley*, Civ. Action No. CV 72-173 (E.D. Ill., defendant filed for summary judgment, Nov. 28, 1972), in J.T. COMM. REP., *supra* note 35, at 60.

218. The Postal Service recommended at the 1972 hearings that these mailings should not be frankable. *House Franking Hearings* 78. *But see* the Service's official position in S. REP. NO. 461, 93d Cong., 1st Sess. 9 (1973). An amendment to prohibit these mailings failed on the House floor during debate on the Act. 119 CONG. REC. H2614 (daily ed. Apr. 11, 1973). Note the Long-Derwinski exchange, *id.* at H2613.

219. TACHERON & UDALL, *supra* note 9, at 95, 115-25.

220. The Seventh Circuit recognized that mass mailings increased voter recognition and that this was a political asset. *Annunzio v. Hoellen*, 468 F.2d 522, 526 (7th Cir. 1972). In 1967, a Gallup poll showed that 57 percent of all Americans could not name their congressman. J. SALOMA 6. A 1973 poll showed that 46 percent could name their congressman; by comparison, 39 percent could name both senators, 59 percent one senator, and 89 percent their governor. N.Y. Times, Dec. 4, 1973, at 2, col. 6.

221. *Senate Franking Hearings*, *supra* note 25, at 49 (chart); V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 493 n.19 (1958).

time of polling has political impact.<sup>222</sup> The cutoff attempts to limit the most blatant use of the frank to bolster the incumbent.

However, if the cutoff takes effect a long time before election—for example, six months, one-fourth of a congressman's term—it destroys the benefits, just outlined,<sup>223</sup> of mass unsolicited mailings for this period and so reduces needed communication. With Congress in session during most primary and run-off elections and until four weeks before the general election, a congressman could not, for over one-fourth of his term, inform his constituents of anything happening in Congress. And, in the rest of his term, he would be able to frank as many mass mailings as he wished. With a long cutoff in effect, constituents would receive a flood of mail for a year and a half, but then not even needed information during the long cutoff. A lengthy ban on mass mailings fails to strike any sort of rational balance between communication and competition.

If the cutoff were for a short time before any election—for example, one month, the period Congress adopted in 1973—it would protect challengers little. Many members of Congress do not frank mass mailings this close to election.<sup>224</sup> Beyond this, a short cutoff does nothing about the most politically effective use of the frank, continuous year-round mailing. A long cutoff ends up with the worst of both worlds; a short cutoff is ineffectual. Even if a "golden mean" could be found, it would necessarily prohibit all mass mailings during the period of the cutoff. Such a prohibition does not strike the balance needed between communication and competition.

The same basic flaw defeats a third perennial proposal, to permit a free mailing for each candidate for Congress.<sup>225</sup> This would at least give a challenger a political weapon, which explains the House's reluctance to approve it.<sup>226</sup> There are the perennial objections—whether to

222. 119 CONG. REC. H2616 (daily ed. Apr. 11, 1973) (remarks of Rep. Frenzel).

223. See pp. 1089-90 *supra*.

224. See, e.g., 119 CONG. REC. H2614 (daily ed. Apr. 11, 1973) (remarks of Rep. Seiberling); *Senate Franking Hearings* 33.

225. THE PUBLIC TRUST, *supra* note 26, at 136-38; V.O. KEY, JR., *supra* note 221, at 549 n.25; H.R. 824, H.R. 5093-95, H.R. 6113, H.R. 7912, 92d Cong., 1st Sess. (1971); S. 1096, S. 1885, 93d Cong., 1st Sess. (1973).

Britain allows each candidate for Parliament one free mailing near election. Representation of the People Act of 1949, 12 & 13 Geo. 6, c. 68, § 79. For an evaluation of these mailings, see G. CARTER, THE GOVERNMENT OF THE UNITED KINGDOM 66 (1967). Members of Parliament have not had a franking privilege since 1840. E. STERN, HISTORY OF THE "FREE FRANKING" OF MAIL IN THE UNITED STATES 1 (1936). The great differences between Parliament and Congress in size of constituencies and nature of duties explains why the M.P. does not need free mail. For comparative discussion of these differences, see K. BRADSHAW & D. PRING, PARLIAMENT AND CONGRESS 121-23 (1972); G. CARTER, THE GOVERNMENT OF THE UNITED KINGDOM 62, 64, 72, 96, 100 (1967).

226. See, e.g., 119 CONG. REC. H2605 (daily ed. Apr. 11, 1973) (remarks of Rep. Hays). Even those congressmen who are not openly hostile to the proposal consider it as unrelated to the franking privilege. *Senate Franking Hearings*, *supra* note 25, at 32.

allow the free mailing in primary as well as general elections and how to decide whether a candidate is serious.<sup>227</sup> But, administrative problems aside, one—or even more than one—mailing near election time, when voters are more skeptical of political literature and may have already decided how they will vote,<sup>228</sup> fails to offset the incumbent's mailings over a two-year period. Thus, the third proposal, even if politically and administratively feasible, fails to secure the goal of competition.

A fourth standard solution is a ban on all postal patron mailings.<sup>229</sup> There is no doubt that the House considers the advantages of postal patron mailings—lower cost and maximum coverage—significant. The Senate attempted for three years in the early 1960's to force the House to repeal the privilege; the Senate later refused the privilege for itself but the House retained the privilege.<sup>230</sup> And, before passing the 1973 Act, the House secured the sponsor's promise that "he would walk out of conference" if the Senate insisted on repealing the right to frank with a simplified address.<sup>231</sup> After the Senate amended the Act to include both the month cutoff and a complete ban on postal patron mailings<sup>232</sup>—neither of which had originally passed the House—the

227. *Senate Franking Hearings* 35.

228. See A. CAMPBELL, *supra* note 160, at 78-80, for an analysis of the stages of a presidential campaign at which voters decide how they will vote.

229. See p. 1078 *supra*.

230. The quarrels over the postal patron privilege between the House and Senate from 1960 to 1963 illustrate how hard the House will fight to keep the ability to frank with a simplified address. From 1924 through 1960, both senators and representatives could mail to each boxholder in rural areas. See note 135 *supra*. Two Postmasters General had issued, but promptly rescinded, regulations allowing the simplified address for urban areas. 106 CONG. REC. 8615 (1960) (remarks of Senator Robertson).

In 1960, the House tried to extend, by language in an appropriations bill, the privilege to urban areas. H.R. REP. NO. 1281, 86th Cong., 2d Sess. 17-18 (1960). The Senate disagreed that the House language would accomplish this result; at any rate, it refused to act on the bill with the House language in it. S. REP. NO. 1282, 86th Cong., 2d Sess. 12 (1960); 106 CONG. REC. 3275 (1960). The stalemate over the Post Office Appropriations Bill threatened a closing of all post offices. 106 CONG. REC. 11876 (1960). Finally, the House gave up its language. 106 CONG. REC. 14081 (1960).

In 1961, the House succeeded in extending the simplified address privilege to urban areas. H.R. REP. NO. 1175, 87th Cong., 1st Sess. 13 (1961); 107 CONG. REC. 21396 (Hruska-Hayden exchange) (1961); Act of Sept. 30, 1961, Pub. L. No. 87-332, 75 Stat. 747.

In 1962, the Senate held out for and obtained repeal of the postal patron privilege for both urban and rural areas. 108 CONG. REC. 19721, 19946 (1962); Act of Oct. 2, 1962, Pub. L. No. 87-730, § 105, 76 Stat. 694. For fiscal year 1963, neither House nor Senate had the privilege for either urban or rural areas.

In 1963, the Senate first decided that it would forego the privilege for itself and let the House do as it wished. S. REP. NO. 313, 88th Cong., 1st Sess. 6 (1963); 109 CONG. REC. 21624 (1963). Later, however, the Senate rejected a conference report in order to force the House to restrict the postal patron privilege to each member's district. 109 CONG. REC. 22886, 22891, 24832 (1963). Even after this compromise, the Senate approved the House district-only postal patron privilege by but one vote. 109 CONG. REC. 25027 (1963); Act of Dec. 30, 1963, Pub. L. No. 88-248, § 104, 77 Stat. 818.

231. 119 CONG. REC. H2602 (daily ed. Apr. 11, 1973).

232. See pp. 1077-78 *supra*.

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House, true to the sponsor's promise, exchanged deletion of the postal patron mailing ban for inclusion of the cutoff.<sup>233</sup> Thus, the House will fight and sacrifice to retain the ability to frank with a simplified form of address.

But, in reality, a ban on postal patron mailings would reduce only slightly the quantity and frequency of mass mailings. Mailing lists<sup>234</sup> and addressing machines<sup>235</sup> are in abundant supply. With the postal patron address banned, mass mailings would cost a little more to address<sup>236</sup> and would miss a few constituents not on any lists.<sup>237</sup> But these changes would not significantly affect the overall volume and effectiveness of mass mailings; only the form would be changed. A ban on postal patron mailings would promote competition little while leaving the stream of mass mailings at only a minimally lower level.

Thus, these four oft-suggested solutions do not in any reasonable way reconcile the need for communication between representative and citizen with the need for fair elections. A new solution is necessary to reach these ends.

### IV. Disclosure of the Amount and Frequency of Each Representative's Franking

The House of Representatives should institute a system of counting<sup>238</sup> and publishing<sup>239</sup> the number of pieces of mail which each member sends each month under the frank. This proposal strikes the best balance between communication and fair elections.

233. Compare Congressman Udall's remarks about the month cutoff in *Senate Franking Hearings*, *supra* note 25, at 27, with his remarks about the postal patron privilege in 119 CONG. REC. H2602 (daily ed. Apr. 11, 1973).

234. Lists of registered voters and of voters by interest groupings are readily available. *House Franking Hearings*, *supra* note 19, at 90. The Senate has a mailing service. *Senate Franking Hearings* 24.

235. See the comments by Congressman Smith on the Senate's machines in 119 CONG. REC. H2603 (daily ed. Apr. 11, 1973).

236. See p. 1078 *supra*.

237. See *id.*

238. The simplest way to accomplish this is to:

- (1) Make illegal any printing of the frank on any envelope or cover;
- (2) Assign each Washington and district office a postage meter, which imprints the member's frank and meets regular Postal Service postage meter requirements;
- (3) Require the House Post Office (which, despite its name, is not under Postal Service jurisdiction, *House Hearings*, *supra* note 10, at 992, 997, 1075) to check the Washington meters once a month and record the number of letters franked during that month;
- (4) Require the Post Offices in the towns of the district offices to check the district meters once a month and record the number of letters franked during that month;
- (5) Require the House Post Office and House Folding Room to develop a way of affixing the frank to mass mailings and of recording and reporting the number so affixed.

The House could institute this system by a House Resolution.

239. The logical place to publish the figures, listed by congressman by month, is in the *Report of the Clerk*, discussed at note 267 *infra*.

First, disclosure will provide information now lacking. The real harm to challengers, and the key policy failing of the Act, is the sheer bulk of franking, of continuous mass mailing over the congressman's term. Yet, nowhere is the amount of mail which each member franks recorded.<sup>240</sup> Therefore, any discussion of the franking privilege lacks the basic information at issue.

Congress needs the information which this system would provide. There are occasional suggestions that Congress limit the number of mass mailings,<sup>241</sup> or the total amount of free mail per member.<sup>242</sup> A limit of either sort may prevail some time, particularly because all the other congressional perquisites have ceilings which are the same for all representatives.<sup>243</sup> Before Congress should consider an across-the-board limit, however, it and the public need to know the magnitude of the present practice.

The courts, or the Commission if it lasts, needs information also. At present, the challenger may realize that his biggest barrier is continuous franking. Yet he and the tribunal to which he appeals lack quantification of the harm: They lack comparison among congressmen and information about one congressman over time.

The second advantage of the disclosure system is that it will provide a sanction against excessive use of the frank. The representative will remain the main judge of what and when he should frank. But, with the number and frequency of mailing made public, he will have to compare gain from mailings which reflect well on him<sup>244</sup> with possible loss from political, media, and public reaction to the disclosure. Op-

240. *House Hearings*, *supra* note 10, at 1073 (Wyman-Jennings exchange). The Postal Service calculates only the total amount of franked mail. *Id.* at 1067; see the Postal Service's annual *Cost Ascertainment Report* for each year's totals, in addition to the sources listed in note 25 *supra*.

241. *House Franking Hearings*, *supra* note 19, at 85; 119 CONG. REC. H2606 (daily ed. Apr. 11, 1973).

The state of Oregon enacted what was in effect a limit on franked mailings. It required that, after a congressman files for reelection, all his mailings count toward his permissible campaign expenditure limit at the first class postage rate. *Senate Franking Hearings*, *supra* note 25, at 27. Current federal law specifically allows states to regulate campaign finances, even finances of elections for federal offices, unless there is a direct conflict with a federal provision. Act of Feb. 7, 1972, Pub. L. No. 92-225, § 403, 86 Stat. 3.

This is the wrong sort of solution. If a state had an early filing deadline, the effect would be to penalize a professional politician in the most drastic way for normal communication with his constituents; one newsletter sent six months before the general election would consume one-third of the representative limit. *Senate Franking Hearings* 27. This solution thus has the same effect as a long cutoff, which was rejected at p. 1091 *supra*.

Even if this proposal had merit on policy grounds, the Act forecloses it by forbidding states or localities to pass Oregon-like acts. Act § 3210(f).

242. *House Hearings*, *supra* note 10, at 1077, hint at something like a weight limit.

243. See the discussion of the allowances in notes 8-15 *supra*.

244. Wall St. J., March 6, 1973, at 1, col. 4 (quoting Rep. Jack Brooks).



ponents will have more complete and objective indicators to refer to in press releases,<sup>245</sup> appeals to the public, or complaints to a court. The mass media, particularly the press,<sup>246</sup> are another set of potential critics. Finally, through all these, voters who now see mostly the benefits of the frank will better see its cost in dollars and cents, as well as its potential for political abuse.<sup>247</sup> And, if it is true that voters have become more sophisticated and independent since World War II,<sup>248</sup> they will be good judges of a congressman's use of his frank.

In the past, there has been only spotty and unofficial disclosure of the number and frequency of mailings.<sup>249</sup> Yet, excessive use of the franking privilege has been a campaign issue.<sup>250</sup> And in two cases in 1972, this issue is credited with helping defeat incumbents.<sup>251</sup> Official disclosure will provide an objective basis for one side to criticize and for the other to defend, and thus increase its potential as a political issue. In this way disclosure strikes the best possible balance between communication and competition.

To these two advantages—information and limits—there are two obvious objections. The first is that disclosure will provide no sanction to the congressman's use of the frank; that he can continue to frank as he wishes; that challengers will have gained nothing; and, that the need for fair elections will not be enhanced.

However, as indicated, occasional disclosure has contributed to defeat of incumbents; continuous disclosure can only increase the political penalty and thus force incumbents to heed it.<sup>252</sup> In addition, the

245. Congressmen feel that newspapers print any release that the opponent puts out. *House Franking Hearings*, *supra* note 19, at 93.

246. Congressmen have traditionally considered the press hostile to the frank. 119 CONG. REC. H2616 (1973) (remarks of Rep. Burlison); 53 CONG. REC. (APP.) 1608 (1916); J. SALOMA, *supra* note 10, at 170-71.

247. For the same philosophy that voters should be the main judges, see *House Franking Hearings* 61-62.

248. 119 CONG. REC. H2606 (daily ed. Apr. 11, 1973). For the best political science analysis of this proposition, which concludes that voters are becoming more astute, see Pomper, *Toward A More Responsible Two-Party System? What, Again?*, 33 J. POL. 916, 929-40 (1971).

249. See *Senate Franking Hearings*, *supra* note 25, at 31-32, for these unofficial disclosure methods.

250. S. BAILEY & H. SAMUEL, *supra* note 87, at 44; 31 CONG. Q.W. REP. 1024 (1973).

251. *House Franking Hearings* 95. For the general philosophy that this will happen, see *id.* at 88; 119 CONG. REC. H2616 (daily ed. Apr. 11, 1973) (remarks of Rep. Derwinski); 72 CONG. REC. 1735 (1930).

252. The assumption here that publicity will alter behavior was eloquently stated by Louis Brandeis:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the best policeman. L. BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1934). Note also that disclosure requirements of the federal securities laws deter socially undesirable behavior. V. BRUDNEY & M. CHIRELSTEIN, *CORPORATE FINANCE* 716-17 (1972).

only evidence<sup>253</sup> available indicates that less than 10 percent of the House's members does one-half its franking.<sup>254</sup> It is unlikely that this minority will not, after disclosure, be subject to political, media, and public criticism; it is likely that they will change their franking habits. Even if all congressmen frank exactly the same amount of mail, the sheer dollar amount—\$71,000 per congressman in 1974<sup>255</sup>—will now be linked to each congressman; this in itself should cause incumbents second thoughts about mailing. The fact that Congress discloses all other expenditures for perquisites of each congressman,<sup>256</sup> except for franked mail, is some indication that congressmen consider disclosure at least embarrassing, if not damaging.

The second objection is the opposite of the first: that a congressman will not communicate enough with his constituents after disclosure for fear of public criticism. This objection fails mainly because mailings are always made to a recipient. If that person judges that the mailings are legitimate, then the representative has nothing to fear. True, this requires an estimate on his part of public opinion as to the specific mailing and as to the aggregate. But this ability to estimate public reactions is the key to his profession. A congressman need not fear to communicate as long as he can justify each mailing to each recipient; if questioned on the total, he need only tell publicly its composition. In fact, a congressman may wish to explain on the face of the mailing that the taxpayers are paying the postage, and he may gain from disclosing prior to, and more fully than, the official tally.

Once the first two advantages—information and limits—materialize, a third will also: The courts may be able to establish standards for review of the use of the franking privilege. If the logic of this Note is correct, two of the authorized uses of the frank and all the enforcement machinery should be declared unconstitutional. Then the district

253. The House's "confidential" survey in 1962, see *THE CONGRESSMAN'S ROLE*, *supra* note 87, at 56.

254. Some 15 Congressmen sent out 400,000 or more pieces of free mail each during the first seven months of the year [1962] while 19 sent out 300,000 to 400,000 pieces. These 34 heavy users, mostly Republicans, accounted for about 14 million pieces, well over half the House total. . . . In the middle range, well scattered between 5,000 and 300,000 pieces were 168 (about 73 percent), while only 29 sent out 5,000 pieces or less.

*THE CONGRESSMAN'S ROLE* 56 (quoting Roll Call: The Newspaper of Capitol Hill, Sept. 12, 1962, and Jan. 23, 1963). The results of this survey match the observation that five percent of House members take up 80 percent of the space of the Appendix to the *Congressional Record*. IN *CONGRESS ASSEMBLED*, *supra* note 17, at 282. Most of the material franked as *Congressional Record* reprints is from the Appendix. *Id.* at 12-14.

For a description of how heavy users of the frank voted on the postal patron privilege, see 108 CONG. REC. 19946 (1962).

255. *House Franking Hearings* 89.

256. See note 267 *infra*.

courts will, as in 1972, be forced to decide cases concerning the incumbent's use of the frank. If Congress adopts the disclosure system, the courts will know the quantity and frequency of franking. If the volume of mail franked for the defendant-congressman exceeds other congressmen's totals and the frequency of franking increases greatly nearer elections, the plaintiff-challenger will have a strong case for unconstitutional use of the privilege based on his personal right to equal treatment under federal law as part of due process and on his supporters' rights to vote and to associate. At the least, the representative will have a heavy burden of proof to show that the harm to the challenger is justified by the need for communication.<sup>257</sup>

The issue becomes more difficult if the amount of the congressman's mailings do not reach such an excessive level as to be unconstitutional. In such a case, the judge should set out the competing objectives and avoid an irrelevant motive test.<sup>258</sup> If it appears that the harm to competition outweighs the benefits of communication, then the court should hold that the mailings are not for "the official business, activities, and duties of the Congress of the United States"<sup>259</sup> and do not "directly or indirectly pertain to the legislative process or to any congressional representation function generally."<sup>260</sup> True, the balancing test is not easy or precise within this range. And, if Congress fails to enact a disclosure system, courts will be forced to use the balancing test in more cases where the disclosure information might help decide the case, or at least the burden of proof. But the balancing test shows all parties—incumbent, challenger, public, and reviewing court—the real issue. The disclosure system brings adversaries together before the court of law and the court of public opinion to debate the central problem. From this debate should emerge the best possible balance of the need for fair elections with the need for official communication.

### V. Implications of the Analysis of the Franking Privilege for Other Perquisites

If the logic of this Note is correct, the House takes risks in permitting one of its committees to increase its allowances.<sup>261</sup> The smaller

257. The courts have employed dollar amounts and percent of voters' signatures in order to decide which filing fees and petition-for-nomination laws are unconstitutional. *See, e.g.,* *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). These methods can be extended to unconstitutional franking cases by considering the number and timing of mailings of a particular incumbent in comparison to other incumbents.

258. *See* pp. 1070-71 *supra* for the reasons why a motive test is unwise and unworkable.

259. Act § 3210(a)(1).

260. Act § 3210(a)(2).

261. *See* pp. 1055-56 *supra*.

risk is that of newspaper and television exposés of secret self-dealing or perquisites.<sup>262</sup> The bigger risk is that challengers or voters can convince courts that the official business language in these allowances means not for campaigns;<sup>263</sup> then the recent experience with the franking privilege will be re-acted.

The House needs to state what it considers the proper uses of all its allowances, as it has finally done with the franking privilege. The authorizations for House perquisites are becoming scattered across years of pages of the *Congressional Record*.<sup>264</sup> Worse, several prescribe only a limit in dollar terms and delineate no specific proper uses except for the ubiquitous official business phrase.<sup>265</sup> The House should formulate specific guidelines and publish them in the *Congressional Record* every six months.<sup>266</sup>

As for disclosure of amounts spent, the House already publishes each member's expenditures of perquisites every six months.<sup>267</sup> The

262. See 117 CONG. REC. 26449 (1971) (remarks of Rep. Ford). The Michigan legislature had delegated, as the House has, to a committee the power to adjust allowances; the system ended with newspaper exposés. *Id.* The sponsors of H.R. Res. 457, 92d Cong., 1st Sess., 117 CONG. REC. 26450 (1971), did promise to publish the adjustments of allowances in the *Congressional Record*. See note 8 *supra*.

Note also that other state legislatures—Illinois, New York, Ohio, and Texas—allow one committee to adjust allowances. 117 CONG. REC. 26448 (1971).

263. Of the Orders listed in note 8 *supra*, five—Order No. 2, Revised Order No. 2, Order No. 7, Order No. 8, and Order No. 9—use the term “official” in describing the use of the allowance. One, Order No. 6, uses the term “necessary to the conduct of his office.” The other six—Order No. 1, Revised Order No. 1 of Jan. 26, 1972, Revised Order No. 1 of Feb. 29, 1972, Order No. 3, Order No. 4, and Order No. 5—use no such language. There is no official business language in 2 U.S.C. § 123b (1970), the authorization for the House Recording Studio.

264. See note 8 *supra*.

265. See Order No. 3, Order No. 4, and Order No. 5, *supra* note 8.

266. Congress might more fully disclose by publishing its new specific guidelines in the *Federal Register*; thus they would automatically be cumulated in the *Code of Federal Regulations*. The statute governing the *Register* does exempt legislative bodies from the requirement of publishing regulations. 44 U.S.C. § 1501 (1970); 120 CONG. REC. H919 (daily ed. Feb. 19, 1974). But it authorizes publication whenever an act of Congress so requires. 44 U.S.C. § 1505(a)(3) (1970). Thus, the Librarian of Congress, an official within the legislative branch, publishes regulations in the *Federal Register*, 44 C.F.R. §§ 501-02 (1973), in accordance with an act of Congress. 2 U.S.C. § 136 (1970). Congress can by law require its guidelines to be published in the *Register* and thus cumulated in title 2 of the *Code of Federal Regulations*, which has never been used. Compare 2 C.F.R. (1938), with 2 C.F.R. (1973). This would require little, if any, change in present law. See 2 U.S.C. 57(a) (1970) (granting the House Administration Committee power to set “terms, conditions, and other provisions” concerning House perquisites). •

267. See, e.g., THE CLERK OF THE HOUSE, REPORT FROM JANUARY 1, 1973 TO JUNE 30, 1973, H.R. Doc. No. 146, 93d Cong., 1st Sess. (1973). This report fulfills the requirements of 2 U.S.C. § 104a (1970), which requires a semi-annual report to be submitted not later than 60 days after the close of the semi-annual period. House members feel that this disclosure leaves their expenditures out in the open. See 116 CONG. REC. 26429-30 (1970) (note particularly the remarks of Speaker Albert about availability of information relating to the compensation of staffs of congressmen).

## Congressional Perquisites and Fair Elections

disclosure of the amount of franking has not met the House's own standard for disclosing the amounts each congressman spends for perquisites.

By learning from its experience with the franking privilege, the House can avoid confusion, embarrassment, and possible loss of necessary allowances. At the same time, the public interest in fair elections will be better protected by a system of guidelines and disclosure which brings the limits of publicity upon office-holders.